

Supreme Court of the United States

OCTOBER TERM, 1965

No. 969

WILLIAM EVERETT REED, PETITIONER

vs.

GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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Original Print

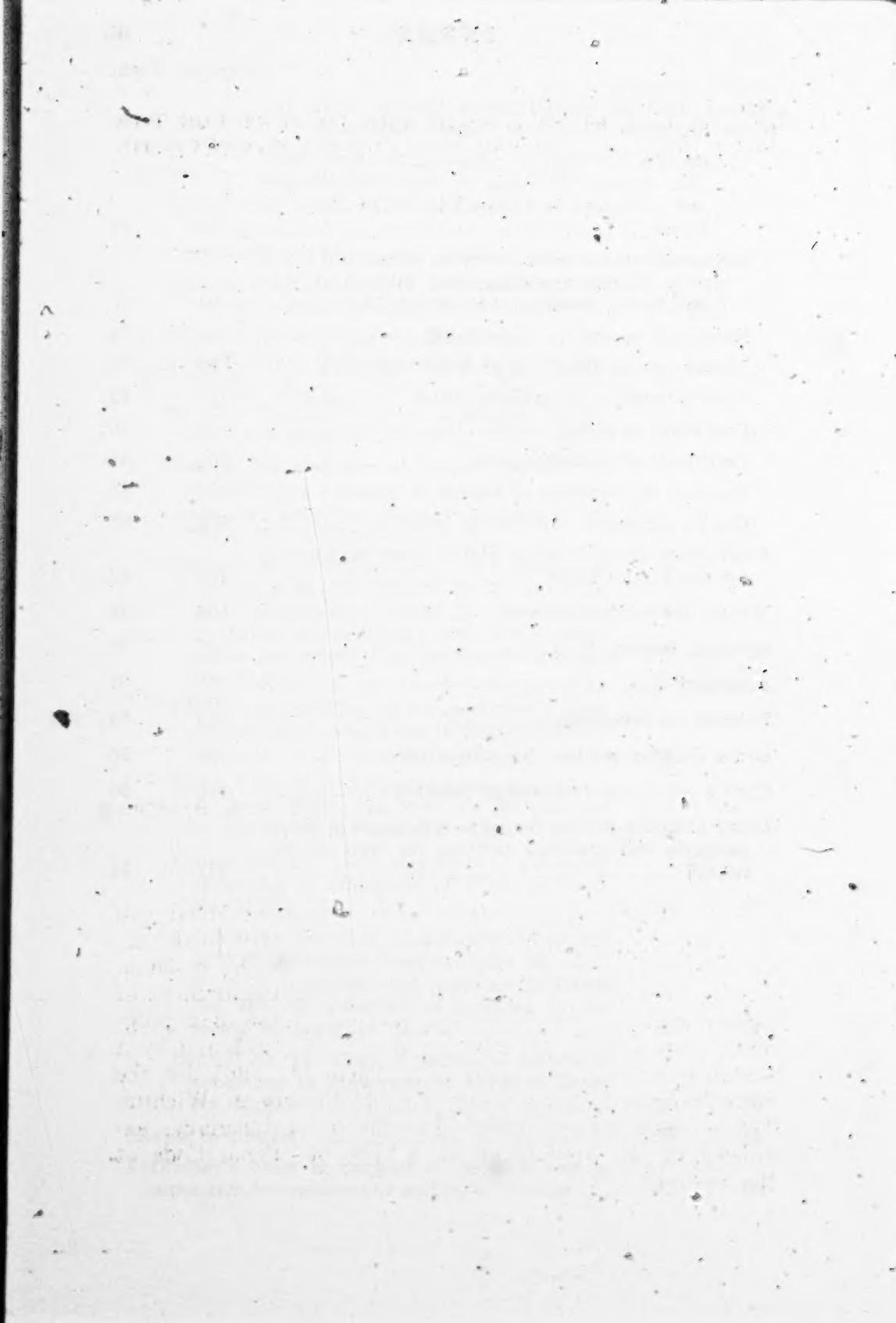
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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

No. 64-H-17, CIVIL

UNITED STATES OF AMERICA, EX REL.
WILLIAM EVERETT REED, RELATOR,

vs.

DOCTOR GEORGE J. BETO, DIRECTOR OF TEXAS
DEPARTMENT OF CORRECTIONS,

AND

STATE OF TEXAS, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS—Filed:
January 9, 1964

TO THE HONORABLE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION:

The petition of William Everett Reed respectfully
shows:

I.

That he is a citizen of the United States of America
and of the State of Texas.

II.

That he is at present unconstitutionally detained and
imprisoned at the State Penitentiary of Huntsville, Texas,
within the District for which this Court sits, by respondent
Dr. George J. Beto, Director of Texas Department of
Corrections and the State of Texas, by virtue of a judgment
pronounced upon him on March 14, 1961 and by a
sentence pronounced upon him April 11, 1961 by the
89th Judicial District Court for the County of Wichita,
Texas, upon conviction of the offense of burglary,
enhanced by the application of Article 63, Penal Code of
the State of Texas.

[fol. 2]

III.

That pursuant to the aforesaid judgment, he is detained by the Respondent, the Warden, at the aforesaid penitentiary for a term of life imprisonment under the provisions of Article 63 of the Penal Code of the State of Texas.

IV.

That Petitioner has exhausted all State remedies, there being no further necessity to petition for certiorari to the United States Supreme Court under 28 U.S.C. sec. 2254. *Fay v. Noia*, — U.S. —, 9 L ed 837. The steps taken by Petitioner to exhaust the State remedies were as follows:

The Petitioner duly appealed to the Court of Criminal Appeals at Austin, Texas, said judgment of conviction being thereafter affirmed by opinion of such State highest appellant Court in an opinion delivered January 10, 1962. Thereafter Petitioner made application for Writ of Habeas Corpus to the aforesaid Court of Criminal Appeals, which relief was denied by such appellant's court in its opinion delivered June 29, 1963.

V.

That Petitioner is restrained and imprisoned pursuant to a sentence that is illegal and void in that Petitioner was denied due process of law as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States. The facts and circumstances under which the denial of Petitioner's constitutional rights took place are as follows:

- [fol. 3] (a) The assessment of the life sentence against Petitioner by virtue of the Habitual Criminal's Statute, Article 63 of the Penal Code of the State of Texas, without any evidence to support the same constitutes a violation of due process.
- (b) There being no legal evidence identifying the Petitioner as that person convicted in the two prior convictions alleged and proven, such evidence relied upon to identify the Petitioner, was in vio-

lation of Petitioner's constitutional right of confrontation as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

- (c) The reading of the allegations in the indictment pertaining to two prior convictions to the jury and the proof of two prior convictions to the jury prior to a determination of guilt by said jury of the primary offense of burglary deprived the Petitioner of his fundamental rights to a fair trial in violation of the Fourteenth Amendment to the Constitution of the United States.

VI.

The Petitioner, now having served a minimum time for the primary offense of burglary, the remaining punishment that he is now undergoing is excessive.

VII.

That no previous application to this Court has been [fol. 4] made for the Writ of Habeas Corpus on the grounds alleged herein.

VIII.

That the affidavit of Hon. Glenn Haynes, Clerk, Court of Criminal Appeals of Texas, attached hereto as Exhibit A to this petition, made a part hereof for all pertinent purposes, sets forth all of the record necessary for a determination of this matter and it would appear that there is no necessity that the Petitioner be brought before this Court unless this Honorable Court determines otherwise, Petitioner hereby expressly waiving his right to appear.

WHEREFORE, Petitioner prays:

1. That a Writ of Habeas Corpus be directed to the Respondent issued in his behalf.
2. That Respondent be required to appear and answer the allegations of this Petitioner.

- 4
3. That, after a full and complete hearing, this Court relieve Petitioner of the unconstitutional detention and imprisonment.
 4. That the Court grant such other, further, and different relief as to the Court may seem just and proper under the circumstances.

/s/ WILLIAM EVERETT REED
CHARLES W. TESSMER
EMMETT COLVIN, JR.
Attorneys for Petitioner
Lawyers Building
706 Main Street, Suite 400
Dallas 2, Texas
RI 8-3433 RI 7-5893

By /s/ EMMETT COLVIN, JR.

[fol. 5] [Duly sworn to by William Everett Reed jurat
omitted in printing (all in italics)]

EXHIBIT A TO PETITION FOR WRIT OF HABEAS CORPUS

THE STATE OF TEXAS
COUNTY OF TRAVIS

Before me, John H. Johnson a notary public in and for Travis County, Texas, on this day personally appeared Glenn Hayes, who being by me here and now duly sworn, upon oath says:

The exhibits attached hereto are true and correct copies of the record in part taken in Cause Numbers 36,003, *Ex parte Reed* and 33,987, *Reed v. State*, 353 S.W. 2d 850. The complete record in both of said causes are within my care, custody and control as the Clerk of the Court of Criminal Appeals of the State of Texas, at [fol. 6] Austin, Texas.

A review of the record in Cause No. 33,987, 353 S.W. 2d 850 reflects that the Defendant, William Everett Reed, did not testify at the trial below and that he plead not guilty.

Exhibit No. 1 is a true and correct copy of the Opinion in Cause No. 36,003, *Ex parte Reed*, of the aforesaid Court of Criminal Appeals.

Exhibit No. 2 is a true and correct copy of the Motion for Rehearing in said Cause No. 36,003.

Exhibit No. 3 is a true and correct copy of the Application for Writ of Habeas Corpus or Writ of Error Coram Nobis filed in said Cause No. 36,003.

After the filing of the Writ, rendition of the Opinion, I can certify that in Cause No. 36,003 that on or about October 16, 1963 the Court of Criminal Appeals overruled the aforesaid Motion for Rehearing without written opinion.

Exhibit No. 4 is a true and correct copy of the Indictment in the record in Cause No. 33,987, *Reed v. State*, 353 S.W. 2d 850.

Exhibit No. 5 is a true and correct copy of the Charge of the Trial Court from the record in Cause No. 33,987, *Reed v. State*, 353 S.W. 2d 850.

Exhibit No. 6 is a true and correct copy of the judgment in the record of Cause No. 33,987, *Reed v. State*, 353 S.W. 2d 850.

Exhibit No. 7 is a true and correct copy of the State's [fol. 7] Exhibit No. 8, consisting of the prior judgment of conviction in Cause No. 4561-IH, introduced into evidence in the Trial Court as reflected by the record in said Cause No. 33,987.

Exhibit No. 8 is a true and correct copy of the State's remaining portion of State's Exhibit No. 8, consisting of the prior sentence in Cause No. 4561-IH together with the Judge's and Clerk's certificates introduced into evidence in the Trial Court as reflected by the record in said Cause No. 33,987.

Exhibit No. 9 is a true and correct copy of the transcript of the testimony at Page 109, Lines 14-24 and Page 110, Lines 1-17, as reflected by the record in said Cause No. 33,987, wherein the aforesaid exhibit, enumerated in the trial as State's Exhibit No. 8, was introduced into evidence as State's Exhibit No. 8 at the trial below. A review of the record reflects no further evidence pertaining to Exhibit Nos. 7 and 8 (State's Trial Exhibit No. 8).

Exhibit No. 10 is a true and correct copy of the Judgment and Sentence in Cause No. 2781-BA, introduced into evidence in the Trial Court below as reflected by the record in said Cause No. 33,987 (said record of prior judgment and sentence of conviction being designated in the Trial Court below as State's Exhibit No. 16).

Exhibit No. 11 is a true and correct copy of the testimony appearing in the Statement of Facts in said Cause No. 33,987 at Page 122, Lines 1-19 wherein said Exhibit [fol. 8] 10 (designated as State's Exhibit No. 16 in the Trial below) was introduced into evidence.

Exhibit No. 12 is a true and correct copy of the commitment papers of William Everett Reed in Cause No. 5201-H, with Judgment and Sentence in Cause No. 4561-IH attached, which commitment papers were offered in evidence in the trial below, as reflected by the record in Cause No. 33,987, as State's Exhibit No. 10, as is further reflected by the attached exhibit set forth in the next paragraph hereto.

Exhibit No. 13 is a true and correct copy of the testimony appearing in the Statement of Facts of Cause No. 33,987, at page 112, lines 17-25; page 113, lines 1-25;

page 118, lines 3-25; page 119, lines 1-10; page 114, lines 1-11 (wherein exhibit designated in this affidavit as Exhibit No. 12 was introduced into evidence and identity established fingerprint comparison before the jury). A review of the record in said Cause No. 33,987 reflects that identity was established in the trial court before the jury solely by the testimony in this Exhibit No. 13 and the introduction of the commitment papers with attachments resigned in this affidavit as Exhibit No. 12.

/s/ GLENN HAYNES

GLENN HAYNES, Clerk, Court of
Criminal Appeals of Texas

Subscribed and sworn to before me, by the said Glenn Haynes, this 31st day of December, 1963, to certify which witness my hand and seal of office.

[fol. 9] My commission expires June 1, 1965.

/s/ H. S. STEINLE

Notary Public in and for Travis
County, Texas

(SEAL)

AFFIDAVIT EXHIBIT No. 1**No. 36,003.****EX PARTE****William Everett Reed****Original Application****OPINION**

Petitioner by writ of habeas corpus attacks as void his confinement under a sentence for burglary, with two prior convictions alleged for enhancement under Article 63, V.A.P.C., alleging that he has served the minimum term provided for burglary and that the proof did not correspond to the allegations in the indictment as to the number of the court in which the prior convictions were had. Appellant's appeal from this conviction is reported as Reed v. State, 353 S.W. 2d 850.

This is not a new contention and has been answered adversely to appellant in Ex parte Seymour, 128 S.W. 2d 46; Ex parte Wingfield, 282 S.W. 2d 219; and Ex parte Sistrunk, 349 S.W. 2d 728.

Ex parte McVickers, 176 P. 2d 40, by the Supreme Court of California, upon which appellant relies, announced no rule of law different from that employed by this Court in Ex parte Puckett, 310 S.W. 2d 117. There, we said that one of the prior convictions relied upon [fol. 10] for enhancement was not, as a matter of law, an offense which was denounced by the laws of Texas as a felony.

The method of proving appellant's identity as being the person theretofore convicted as approved by this Court is Broussard v. State, 363 S.W. 2d 143, does not violate his right of confrontation as guaranteed by the Constitution.

The relief prayed for is denied.

MORRISON, Judge

(Delivered June 29, 1963)

AFFIDAVIT EXHIBIT NO. 2

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

No. 36,003

STATE OF TEXAS

vs

WILLIAM EVERETT REED

MOTION FOR REHEARING

Now comes the Petitioner in the above styled and numbered cause and moves the Court to set aside the Judgment of Affirmance rendered June 29, 1963, and to grant this Motion for Rehearing and order Petitioner discharged from the Texas Department of Corrections.

Petitioner would respectfully point out that the Court erred in holding that Petitioner's incarceration in prison for life without record evidence to support said judgment did not violate the fourteenth amendment of the Federal Constitution of the United States of America.

[fol. 11] Petitioner further requests that this Honorable Court clarify the original Opinion so that there will be no question as to the decision rendered with reference to the due process clause of the Fourteenth Amendment of the United States Constitution.

WHEREFORE, premises aforesaid, Defendant prays that the Court grant this Motion and issue the writ of habeas corpus as prayed for in the Petition.

/s/ CHARLES WILLIAM TESSMER
Lawyer's Building
706 Main Street
Dallas 2, Texas

Received in the Court of Criminal Appeals, Austin, Texas

Jul 10, 1963

Glenn Haynes, Clerk

AFFIDAVIT EXHIBIT No. 3

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

No. 36,003

EX PARTE WILLIAM EVERETT REED

vs

DR. GEORGE J. BETO, DIRECTOR OF TEXAS
DEPARTMENT OF CORRECTIONS AND
STATE OF TEXAS, RESPONDENT

APPLICATION FOR WRIT OF HABEAS CORPUS OR
WRIT OF ERROR CORAM NOBIS

"THE STATE HAVING WHOLLY FAILED TO
ESTABLISHED BY THE EVIDENCE THE TWO
[fol. 12] PRIOR CONVICTIONS RELIED UPON TO
ENHANCE RELATOR'S PUNISHMENT TO LIFE
IMPRISONMENT IN THE PENITENTIARY, AND
RELATOR HAVING SERVED THE MINIMUM PUN-
ISHMENT ASSESSABLE FOR THE PRIMARY OF-
FENSE ALLEGED IN THE INDICTMENT, IN NOW
ENTITLED TO HIS DISCHARGE FROM CUSTODY."
EX PARTE BURCH, 267-2-560.

/s/ CHARLES W. TESSMER
Attorney for Plaintiff

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

No. _____

EX PARTE WILLIAM EVERETT REED

v/s

DR. GEORGE J. BETO, Director of Texas Department
of Corrections and

STATE OF TEXAS, RESPONDENT

ORIGINAL APPLICATION FOR THE WRIT OF
HABEAS CORPUS OR WRIT OF ERROR CORAM
NOBIS

MAY IT PLEASE THE COURT:

By this application for the writ of habeas corpus, or other relief, Relator William Everett Reed, seeks his outright discharge from the custody of the warden of the Department of Corrections of this State, where and by whom he is now unlawfully confined and deprived of his liberty.

It is Relator's contention that he has fully served all punishment lawfully assessed against him under the judgment whereby it is claimed that he should be kept in prison and custody.
[fol. 13]

Relator's contention is fully set out in the statement and argument attached to this writ to which reference is here made, and which is made a part of this application.

All facts relied upon by the Relator to sustain his contention are taken from and are to be found in the record of the case before this Court, No. 33987, wherein William Everett Reed is Appellant and the State of Texas, Appellee, appealed from the District Court of Wichita County, Texas which was in all things affirmed by this Court. Such being true, no necessity exists to introduce any evidence in support of the application.

Wherefore, Relator prays that this Court issue its writ of habeas corpus and, upon final hearing, he be

discharged from the custody of the Department of Corrections of this State.

WILLIAM EVERETT REED

Subscribed and sworn to before me this) 10th day of May, 1963.

SAM N. BOLES
Notary Public Walker Co., Texas

[fol. 14]

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

No. _____

EX PARTE WILLIAM EVERETT REED

vs

DR. GEORGE J. BETO, Director of Texas Department
of Corrections and

STATE OF TEXAS, RESPONDENT

STATEMENT FROM THE RECORD AND ARGUMENT SUPPORTING RELATOR'S APPLICATION FOR THE WRIT OF HABEAS CORPUS

STATEMENT

Relator was on the 14th day of March, 1961, convicted in cause No. 11,416-C in the District Court of Wichita County, of the primary offense of burglary, with two prior convictions of ordinary felonies. His punishment was assessed at confinement in the penitentiary of this state for life. From that conviction an appeal was perfected to the Court of Criminal Appeals, and became No. 33987, upon the docket of said Court. The conviction was duly affirmed by said Court and appears as *Reed v. State*, 353 S.W. 2d 850. Relator was subsequently

taken into custody and delivered to the penitentiary of this state, and began the service of the sentence imposed.

He has not served on that sentence a total of two (2) years and twenty-two (22) days, as shown by the certificate of the Department of Corrections of this state which is attached hereto and made a part hereof, and dated April 25, 1963.

It is Relator's contention that the only valid punishment authorized to be assessed against him under the [fol. 15] record in that case, was the minimum punishment of two (2) years confinement in the penitentiary, for the crime of burglary, and that the assessment of a punishment of life in the penitentiary is wholly null and void and utterly without support by the testimony.

ARGUMENT

The two prior convictions relied upon to enhance the punishment to life imprisonment as an habitual offender, were alleged as follows:

Count No. 2 charged that Appellant had been on the 15th day of March, 1954, convicted in the Criminal District Court No. 2, of Dallas County, Texas, in cause No. 4561-H, upon the docket of that Court, of felony theft. To sustain that allegation, the state relied upon and introduced in evidence a certified copy of a judgment and sentence rendered in the Criminal District Court No. —, Dallas County, No. 4561-H, upon the docket of that Court, which judgment follows the usual form applied in pleas of guilty in felony cases before the Court and without the intervention of a jury. The punishment assessed was ten (10) years confinement in the state penitentiary. What Relator especially points out is that nowhere in said judgment do we find any reference to Criminal District Court No. 2 of Dallas County, Texas, as charged in the indictment. There is nothing in said judgment or the caption thereof which shows that the judgment was rendered in Criminal District Court No. 2 of Dallas County, Texas. To the contrary, all reference to the Court rendering the judgment is that of Criminal District Court

[fol. 16] No. —— of Dallas County. There is, therefore, a fatal variance between the judgment alleged in the indictment and that relied upon to sustain that allegation.

The sentence passed upon the judgment, shows to have been printed upon a single sheet of paper with the judgment and follows on that single sheet of paper the judgment. The sentence is in the usual form, provided by law. Other than to a reference that the sentence was being pronounced in open Court, there is no reference whatsoever to the fact that the sentence was being passed in and as being the sentence of the Criminal District Court No. 2 of Dallas County, Texas.

There is no question but that the judgment and sentence showed that it was rendered in the Criminal District Court No. ——, Dallas County.

That certificate to the judgment and sentence, corroborated the above statement. That certificate was made by Bill Shaw, the Clerk of the Criminal District Courts of Dallas County, Texas, who certified that the judgment and sentence "is a true and correct copy of the judgment and sentence of the court rendered and entered in the case of The State of Texas vs. William Everett Reed, No. 4561-IH, as the same appears of record in Book 38, page 574, minutes of the court". WHAT COURT? The Criminal District Court of Dallas County, Texas, of which Bill Shaw was the Clerk. Moreover, the certificate of Judge Henry King attached to the certified copies, certifies that Bill Shaw is the Clerk of the Criminal District [fol. 17] Courts of Dallas County, Texas.

It is, therefore, shown without contradiction, that the State of Texas, not only wholly failed to prove the allegation of former conviction as alleged in the indictment, but proved a former conviction in another and different Court.

This Court judicially knows that there is a Criminal District Court of Dallas County, Texas, and a Criminal District Court No. 2 of Dallas County, Texas, because each Court is created by statute and is separate and distinct from each other. Article 52, C.C.P.

Such being true, there is no place here for an application of the rule on intent, that is that the state intended to allege in the indictment that the judgment and sen-

tence were rendered in the Criminal District Court No. 2 of Dallas County, Texas, or that the Clerk in certifying to the judgment and sentence was in error, and intended to certify to the judgment and sentence as having been rendered in Criminal District Court No. 2, rather than in the Criminal District Court of Dallas County, Texas.

The state in the trial of the case against Relator just failed to prove the allegations of the indictment as to Relator's prior conviction as alleged in the Second Count of the indictment.

The second prior conviction upon which the state relied to enhance Relator's punishment as an habitual offender, was set out as the "Eighth Count" of the indictment as certified by the Clerk of the District Court of Wichita County, Texas, in the amended transcript, cer-[fol. 18] tified to by him on the 22nd day of December, 1961. This is called to the Court's attention because the verdict of the jury expressly found that Relator was guilty of the prior conviction alleged in the second and tenth counts of the indictment. There was no tenth count in the indictment which the Clerk certified to on the date above mentioned. It is impossible, therefore, to ascertain from the verdict of the jury of what the jury found Relator had been convicted in the tenth count of the indictment.

But, be that as it may, the second prior conviction upon which the state relied in the eighth count, alleged that Relator had been convicted on the 20th day of June, 1947, in case No. 2781-BA in said Court of an ordinary felony.

Their certified copies of the judgment and sentence offered in evidence to support that allegation, are in the exact situation as those under the second count. There is an utter absence of any proof that the judgment and sentence was rendered in the Criminal District Court No. 2 of Dallas County, Texas, as alleged in the indictment. All the instruments show that the judgment and sentence there certified, were rendered in the Criminal District Court of Dallas County, Texas. A complete variance between the allegations and the proof as to the second prior conviction relied upon is shown. We will not burden the Court with again pointing out wherein the certified copies refer to the Criminal District Court of Dallas County,

[fol. 19] Texas, but content ourselves with saying that they are the same as pointed out heretofore in discussing the first prior conviction relied upon.

The state in the trial of this Relator in the District Court of Wichita County, Texas, did not prove that Relator has been twice, therefore, convicted on ordinary felonies as alleged in the indictment, and the judgment and sentence in that case insofar as it decrees Relator to be an habitual offender and assessing his punishment at confinement is absolutely and utterly void.

Relator, having now served on that sentence two (2) years and twenty-two (22) days which is in excess of the minimum punishment authorized to be assessed for the crime of burglary as charged in the primary offense, is entitled to his discharge from any further custody under that judgment and sentence.

LAW OF THE CASE

Where allegation of indictment of prior conviction for the purpose of enhancing punishment stated that conviction had been had in certain District Court, and proof showed conviction in another District Court, there was a variance between the allegations and proof which was fatal to the conviction. For this variance constituted fundamental error and was properly inquired into by the Court of Criminal Appeals without Bill of Exceptions. *Corley v. State*, 254 S.W. 2d 394, and cases there cited. The *Corley* case involved an appeal from Dallas County and a discrepancy in the charge and the indictment and [fol. 20] the proof involving the same Court as the case at bar. The result of this situation is that actually there was *no evidence* to support a judgment and sentence of life in the penitentiary. In *Ex Parte Lyles*, 323 S.W. 2d 950, Judge Woodley recognized that a collateral attack by habeas corpus may be made upon a judgment on the basis of no evidence. Judge Woodley stated:

"The distinction between a collateral attack upon the conviction on a plea of guilty before the court because no evidence was introduced, and a similar attack upon the judgment upon the contention that the

evidence introduced and upon which the trial judge based his judgment was insufficient to show the guilt of the defendant, was pointed out by Judge Davidson in his dissent in *Ex Parte Keener*, 314 S.W. 2d 98, *supra*.

It is obvious that the situation here presented is one of no evidence as that there was one of insufficient evidence. In *Ex Parte Burch*, 267 S.W. 2d 560, it was there held that a prosecution under Article 63 of the Penal Code does not create an offense of being an habitual criminal but is only an enhancement statute. In other words, it is a condition where an excess of punishment may be assessed upon proper evidence.

The rule as stated in *Corpus Juris Secundum*, Volume 39, *habeas corpus*, Section 26, Subsection I, is as follows:

EXCESSIVE SENTENCE

In case of an excessive sentence, by waiver of authority, [fol. 21] as much of the sentence as is excessive may be relieved against on a habeas corpus, after the valid part thereof has been served or satisfied. Such relief cannot be obtained from an oppressive or unduly severe sentence, which is still within statutory limits. (citing cases)

The foregoing rule is recognized in *Ex Parte Pruitt*, 141 S.W. 2d 333, Judge Hawkins speaking for the Court as presiding Judge, stated at page 335:

"Relator may bring himself within the rule announced in 76 A.L.R. at page 476, as follows: "In the case of a sentence which is merely excessive it seems to be well settled, with the exception of a few early cases, that if the court had jurisdiction of the person and subject-matter of the offense, such sentence is not void ab initio because of the excess, but that it is good so far as the power of the court extends, and is invalid only as to the excess, and therefore a person in custody under such sentence cannot be discharged on habeas corpus until he has suffered or performed so much of it as it was within the power of the court to impose. In addition to a few other cases set out in the annotation which apparent-

ly support this rule, the following show that the rule is well settled." "

"Here follows citation of many cases from the Fed- [fol. 22] eral courts, and also from thirty-seven state appellate courts, among them being *Ex parte Ellerd*, 71 Tex. Cr. R. 285, 158 S.W. 1145, Ann. Cas. 1916D, 361."

Judge Hawkins went on to point out that Relator's application for habeas corpus was premature as he had not served the valid part of his sentence which could have been assessed. The writ of habeas corpus was denied without prejudice to the Relator's right to represent the matter for further consideration when he had brought himself within the above quoted rule.

The attention of the Court is invited to the following cases involving prosecution for enhanced punishment under the habitual criminal statute.

Ex parte Daniels, 252 S.W. 2d 586, in a habeas corpus proceeding it was held that indictment which was insufficient to charge commission of third offense because it was alleged that third offense was not committed subsequent to second offense, it was held that the punishment was excessive and that Defendant having served a period of time in excess of that provided for second offenders would be *discora habeas corpus*.

Ex parte Huff, 316 S.W. 2d 896, a habeas corpus proceeding, was held that where two prior convictions were secured in the same Court on the same date, they could not be used as a basis for prosecution as a third offender in subsequent prosecution. The writ of habeas corpus was granted because neither conviction could have preceded the other to constitute relator a third offender. Relator [fol. 23] was ordered discharged from the penitentiary.

In *Ex parte Puckett*, 310 S.W. 2d 117, it was held that where enhancement of sentence of Relator because of prior conviction in Federal Court was invalid, and Relator had served the maximum term for the second offense of felony theft, he was entitled to the discharge on his application for writ of habeas corpus. The Court in this

case was not only considering the sufficiency of the indictment which alleged a conviction for the National Motor Vehicle Theft Act in Federal Court, but was also considering the question of no evidence to show a conviction for a felony useable under Article 63 of the Penal Code. Judge Woodley stated:

"We need not rest our decision upon these authorities alone. If one who violates the National Motor Vehicle Theft Act would, if the act had been committed in Texas, be guilty of receiving stolen property under laws of this state also, he would not, unless the value of the automobile was \$50 or more, be guilty of a felony."

The Court went on to hold that the allegations of the indictment were insufficient to sustain a life sentence. Judge Woodley further stated:

"There is no question but that this Court has the power and authority to prevent the enforcement of a judgment obtained under circumstances which constitute a denial of due process. *Ex parte McCune*, 156 [fol. 24] Tex. Cr. R. 213, 246 S.W. 2d 171."

The Relator in the *Puckett* case was ordered discharged under authority of *Ex parte Daniels*, 252 S.W. 2d 586 and *Ex parte Pruitt*, 141 S.W. 2d 333.

Relator Reed has brought himself squarely within the excessive punishment rule and having served the minimum term that could legally have been assessed under the admissible evidence, that is, two (2) years for the primary offense of burglary since the jury returned no verdict assessing the term of years, he is entitled to his discharge. *Ex parte Erwin*, 170 S.W. 2d 226; *Ex parte Rolen*, 294 S.W. 2d 403; *Ex parte Goss*, 262 S.W. 2d 412; *Ex parte Castleberry*, 216 S.W. 2d 584; *Ex parte Lindsey*, 331 S.W. 2d 320. Petitioner would point out, however, that Judge Morrison's dissent in *Ex parte Goss* does not touch the case at bar because the dissent that a life imprisonment verdict in a robbery with firearms case should be construed as a term of years to bring the punishment within the robbery with firearms statute.

This is not the case as presented before this Court here and now.

The rule is well settled that where there is no evidence of guilt (no evidence to support the allegation of indictment as to the enhancement statute, Article 63, D.C.) the judgment assessing a life sentence under the enhancement statute is excessive and said excess may be inquired of by habeas corpus after the valid portion of the sentence has been served. *Corpus Juris Secundum*, Vol. 39, habeas corpus, section 226, subsection E, *Ex parte Pruitt*, 141 [fol. 25] S.W. 2d 333, *Ex parte Puckett*, 310 S.W. 2d 117.

The modern rule followed by majority of the states with reference to excessive punishment under the enhancement or habitual criminal statute is discussed in the case of *In Re McVickers* (1946) 29 California, 2d, 264, 176 Pacific 2d, 40. The case held that an adjudication that an offender is an habitual criminal within the meaning of the California statute not to be an element of adjudicated guilt nor a part of the judgment of the conviction, and hence reaches the result that no violence is done to the finality of the judgment of conviction for the primary offense by permitting a collateral attack on the determination as to a prior conviction. So, where proof in habeas corpus proceedings to secure the release of the Petitioner from custody showed that Petitioner was a habitual criminal who had been previously convicted of felonies enumerated in the habitual criminal statute twice, but not three times, one of the convictions constituting only a misdemeanor by California law, was held that the Petitioner was entitled to be accorded the benefits as well as the penalties of the law applicable to persons who had suffered two, rather than three, prior convictions. The Court said that the writ of habeas corpus would lie to review and ancillary adjudication of habitual criminality which was unsupported by the evidence as a matter of law and that the use of the writ for this purpose is not subject to the objection that thereby the writ is made a writ of error to review the judgment of conviction, or that it constitutes an unjustified collateral attack on such judgment, since an adjudication of the habitual criminal status is not a judgment or con-

viction, but involves merely a determination of certain facts which operate to prolong the confinement of the prisoner and limit his right to parole.

This same rule has been followed by this Court in *Ex parte Burch*, 267 S.W. 2d 560, which held that an adjudication of guilt in the enhancement statutes are used does not create an offense of being an habitual criminal. Therefore, the collateral attack by habeas corpus is not upon the judgment of guilt with reference to the primary offense but only as to the enhancement feature of the case which would render a judgment in the case at bar excessive. Petitioner would further point out that this case having heretofore been before this Honorable Court on appeal in *William Everett Reed v. The State of Texas*, — S.W. 2d —, cause number —. This Court would judicially know that there was no evidence introduced to support the enhancement feature of this case and would thus deprive Petitioner of his liberty without due process of law. In *Le Fors v. State*, 278 S.W. 2d 837, on rehearing opinion by Judge Woodley, it was there held that this Court would judicially know this the fact that a prior conviction used for enhancement was a final conviction and that the mandate had been issued by the Court of Criminal Appeals on a conviction occurring several years previous to the prosecution. Thus, the Court of Criminal Appeals referred to its own records of the ap-[fol. 27] peal of the prior case of *Leforis v. State*, 148 S.W. 2d 201, to establish that the prior conviction alleged in the later case of *Le Fors v. State*, 278 S.W. 2d 837, was in fact a final judgment which could be used to enhance the penalty in the later case.

A judgment may be attacked by habeas corpus if matters alleged in the attack are such as, if true, the Trial Court would have been without jurisdiction either in the person of the Relator or the subject matter, or to render the particular judgment, that is life imprisonment, because no evidence was adduced to support said judgment and, therefore, the judgment is excessive beyond the minimum penalty for the primary offense of burglary which would have been two (2) years. Presiding Judge Woodley speaking in *Ex parte Puckett*, 310 S.W. 2d 117, stated:

"There is no question but that this Court has the power and authority to prevent the enforcement of a judgment obtained under circumstances which constitute a denial of due process. *Ex parte McCune*, 156 Tex. Cr. R. 213, 246 S.W. 2d 171."

A conviction of a criminal offense by State Court based upon no evidence constitutes a violation of due process of law. *Thompson v. City of Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654; *Garner v. Louisiana*, 868 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207; and *Taylor v. Louisiana*, 370 U.S. 154, 82 S. Ct. 1188. Therefore, the failure of the state in the case at bar to introduce any evidence to prove the obligation of the indictment that [fol. 28] Petitioner had been convicted in the particular Court alleged constitutes an imprisonment of Petitioner without due process of law as to the excessive punishment.

CLOSING

Petitioner* has observed the minimum term for the primary offense of burglary and the remaining punishment that he is now undergoing is excessive. The question of excessive punishment may be attacked collaterally by a writ of habeas corpus. This is true under existing Texas law without reference to the California rule heretofore discussed as followed in *Chandler v. Fretag*, 348 U.S. 3, 75 S. Ct. 1, wherein it was held that hearing on charge of being an habitual criminal and trial of felony charge may be conducted in a single proceeding, they are essentially independent of each other. The assessment of the life sentence against Petitioner by virtue of the Habitual Criminal Statute, Article 63 P.C., without any evidence to support same constitutes a violation of due process and may be raised collaterally on writ of habeas corpus.

Therefore, the case at bar constitutes one where Appellant is not attacking the validity of the primary offense of burglary and the judgment of conviction based thereon, but is attacking the excess punishment rendered against him without any evidence introduced. Under the *McCune*

and *Puckett* rule, a conviction obtained in violation of due process of law is reviewable on writ of habeas corpus by the Texas Court of Criminal Appeals. In *Ex parte Lyles*, [fol. 29] this Court is recognized that a conviction without evidence as opposed to one based on insufficient evidence raises a due process of law question. Under the *Corley* rule and cases there cited, a fatal variance in proof as to the allegations of previous conviction have the same force in effect as if no evidence was introduced to support the allegations for enhancement in the indictment. This creates an analogy to *Ex parte Puckett*, *Ex parte Scafe*, *Ex parte Daniels*, and *Ex parte Huff*. In all of the aforementioned writ of habeas corpus cases, the judgment itself was not void on its fact but said conclusion was reached from an examination of the pleadings or evidence adduced to support said judgment. A judgment may be attacked as void by habeas corpus if matters alleged in the attack is such as, if true, the Trial Court would have been without jurisdiction either of the person, of the Realtor, or of the subject matter, or to render the particular judgment. *Ex parte Cain*, 217 S.W. 386, In the case at bar, the Trial Court was without power to render a judgment of life imprisonment because there was no evidence introduced to support said judgment. The Petitioner having served the minimum sentence for the primary offense is entitled to his discharge from further confinement of restraint by authority *Ex parte Rola*, 294 S.W. 2d 403, citing *Ex parte Goss*, and *Ex parte Erwin* and in this connection see also *Ex parte Castleberry*, 216 S.W. 2d 584.

It is, therefore, respectfully submitted that Petitioner's [fol. 30] further confinement is in violation of due process of law and that this Honorable Court should issue and grant the writ of habeas corpus as prayed for and order Petitioner discharged from the Texas Department of Corrections forthwith.

If it be conceded that the state proved the two prior convictions as alleged, then:

"THERE IS NO LEGAL EVIDENCE IDENTIFYING THE RELATOR AS THAT CONVICT."

The evidence relied upon to identify the Relator, was in violation of Relator's constitutional right of confrontation as guaranteed by Sec. 10 of Article 1, of the Constitution of Texas, and the 6th Amendment to the Constitution of the United States and, which violation by a State Court constitutes to Relator, a violation of due process as guaranteed by the 14th Amendment to the Constitution of the United States.

By the unlawful and illegal testimony relied upon to support the identification of Relator as the prior convict, definitely raises the federal question that Relator has been denied due process of law in obtaining this conviction, insofar as the prior convictions are concerned.

Now did the state identify the Relator as the prior convict?

To sustain the allegation that the Relator was the one and same *person* convicted on the 15th day of March, 1954, in the Criminal District Court No. 2 of Dallas [fol. 31] County, Texas, in cause No. 4561-IH as alleged in the second count of the indictment, the certificate of J. C. Roberts, Record Clerk of the Texas Department of Corrections, to which he attached (1) a photograph, (2) fingerprints, (3) commitments, of the originals of record in his office, of William Everett Reed, No. 138706.

The commitments referred to were the same as the judgment and sentence the state has used in evidence as heretofore pointed out. The fingerprints, purported to be those of William Everett Reed, as was the photograph.

With the fingerprints so certified, a fingerprint expert based upon a comparison therewith known fingerprints furnished from the Department of Corrections were those of the Relator. It was upon this testimony, alone, that the state relied to identify the Appellant as being the one and same person as was convicted in the Criminal District Court No. 2 of Dallas County, Texas, as alleged.

All this identifying evidence was received over the objection of Relator's counsel.

The same procedure was employed in identifying by fingerprints the Relator as the convict alleged to have been convicted in the Criminal District Court No. 2 of Dallas County, Texas, on the 20th day of June, 1947, in

cause No. 2781-BA on the docket of said Court as charged in the eighth count of the indictment.

The proof relied upon by the state is the same procedure approved in numerous Texas cases, chief among which [fol. 32] is that of *Davis v. State*, 321 S.W. 2d 873, over a dissenting opinion expressing the view that the evidence violated the constitutional guarantee of confrontation. In none of those cases wherein the procedure was approved did the Court of Criminal Appeals pass upon the constitutionality thereof, as against the contention of a violation of the guarantee of confrontation.

The Supreme Court of the United States nor any of the other Courts of Federal jurisdiction approved the procedure, especially against the contention of a violation of the constitutional guarantees of confrontation.

Relator, therefore, presents the question here and insists that the evidence identifying him as the prior convict as alleged in the indictment violated the guarantee of both the State and Federal Constitution as heretofore pointed out, and especially the violation of the 6th Amendment by a State Court which constitutes to this Appellant a denial of due process under the 14th Amendment to the Constitution of the United States.

In conclusion it is respectfully submitted that by no process of reasoning, may it be said that upon the trial of the case against the Relator, in which he was assessed a punishment of life imprisonment as an habitual offender with punishment assessed at life imprisonment in the penitentiary, the state proved that the Relator was the convict who had been convicted of the offenses and in the Courts alleged in the indictment.

Relator was properly and legally convicted the primary [fol. 33] offense of burglary as alleged on the first count of the indictment (*Owens v. State*, 283 S.W. 2d 749), and the jury not having fixed the punishment for the violation of that offense, Relator is entitled to be discharged having served the minimum punishment affixed by statute for such primary offense.

Wherefore, Relator respectfully prays that he be discharged from custody of the Texas Department of Cor-

rection where he is now held and deprived of his liberty in violation of the law.

Respectfully submitted,

CHARLES W. TESSMER
706 Main Street
Lawyers Building
Dallas 2, Texas

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS
AT AUSTIN, TEXAS.

No. _____

EX PARTE WILLIAM EVERETT REED

ORDER

On this _____ day of _____, 1963, came on to be heard Petitioner's Original Application for Writ of Habeas Corpus and Petitioner's Application is ordered filed by the Clerk of this Court and the cause will be set down for hearing to determine whether the Writ of Habeas Corpus shall issue or not.

Entered this _____ day of _____, 1963.

Judge, Court of Criminal Appeals

Judge, Court of Criminal Appeals

Judge, Court of Criminal Appeals

[fol. 34]

AFFIDAVIT EXHIBIT No. 4**INDICTMENT IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:**

THE GRAND JURORS for the County of Wichita, State aforesaid, duly organized as such at the January Term, A.D. 1961, of the 89th District Court for said County upon their oaths in said Court present that WILLIAM EVERETT REED, hereinafter called defendant, on or about the 14th day of March, A.D., 1960, and anterior to the presentment of this indictment, in the County of Wichita and State of Texas, did then and there unlawfully, by force, threats and fraud, break and enter a house there situated and occupied and controlled by one Ernest Guffey, hereinafter called owner, without the consent of said owner, then and there with the intent of said Defendant fraudulently to take, steal and carry away from and out of waid house the corporeal personal property then and there in said house belonging to said owner, from the possession of said owner, without the consent of the said owner of the said corporeal personal property, with the intent to deprive the said owner of the value thereof and with the intent to appropriate the same to the use and benefit of him, the said Defendant.

SECOND COUNT: AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present that prior to the commission of the offense set out in the First Count of this indictment by the said William Everett Reed, he, the said William Everett Reed, was duly and legally convicted of a felony less than capital, to-wit, on the 15th day of March, 1954, in the Criminal District Court No. 2 of Dallas County, Texas, in a [fol. 35] case in said Court numbered 4561-IH and entitled The State of Texas vs. William Everett Reed, the said William Everett Reed was duly and legally convicted of an offense of the same nature as that hereinbefore charged against him in this cause, to-wit, theft of corporeal personal property of the value of \$50.00 or over, a felony less than capital, and said conviction occurred and the judgment thereon became final prior to the com-

mission of the offense hereinabove alleged in and by the First Count of this indictment upon an indictment then legally pending in said last named Court, of which the said Court had jurisdiction; said conviction was, and it is, a final conviction; and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. 4561-IH, in the Criminal District Court No. 2 of Dallas County, Texas, under the name of William Everitt Reed.

THIRD COUNT: AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present that prior to the commission of the offense set out in the First Count of this indictment by the said William Everett Reed, he, the said William Everett Reed, was duly and legally convicted of a felony less than capital, to-wit, on the 15th day of March, 1954, in the Criminal District Court No. 2 of Dallas County, Texas, in a case in said Court numbered 5201-H and entitled The State of Texas vs. William Everitt Reed, the said William Everett Reed was duly and legally convicted of an offense of the same nature as that hereinbefore charged against him in this cause, to-wit, burglary, a felony less than [fol. 36] capital, and said conviction occurred and the judgment thereon became final prior to the commission of the offense hereinabove alleged in and by the First Count of this indictment upon an indictment then legally pending in said last named Court, of which the said Court had jurisdiction; said conviction was, and it is, a final conviction was, and it is, a final conviction; and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. 5201-H, in the Criminal District Court No. 2 of Dallas County, Texas, under the name of William Everitt Reed.

FOURTH COUNT: AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, further present that prior to the commission of the offense as set out in the First Count of this indictment by the said William Everett Reed, he, the said William Everett Reed, was duly and legally convicted of a felony less than capital, to-wit, on the 19th day of January, 1954, in the United States District Court for the Northern District of Texas,

Dallas Division, in a case in said Court numbered 13,485 Criminal, and entitled United States of America vs. William Everett Reed, the said William Everett Reed was duly and legally convicted of a felony as aforesaid, a felony offense of having in his possession with intent to utter and publish as true, and uttering and publishing as true, a certain false writing, to-wit, a prescription, for narcotic drugs, a compound, sale, manufacture, derivative, and preparation of opium, to-wit, dilaudid, in violation of Section 494, Title 18, U.S.C.; and the said con-[fol. 37] viction occurred and the judgment thereon became final prior to the commission of the offense hereinabove alleged in and by the First Count of this indictment upon an indictment then legally pending in the said last named Court, of which said Court had jurisdiction and said conviction is final, and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. 13,485 Criminal, in the United States District Court for the Northern District of Texas, Dallas Division, under the name of William Everett Reed.

Strike

FIFTH COUNT: AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present that prior to the commission of the offenses alleged in and by the First Four Counts of this indictment, he, the said William Everett Reed, was duly and legally convicted of a felony offense less than capital, to-wit, on the 18th day of July, 1949, in the United States District Court for the Northern District of (STRIKE) Texas, Dallas Division, in case in said Court numbered 12,234 Criminal and entitled United States of America vs. William Everett Reed, the said William Everett Reed was duly and legally convicted of a felony as aforesaid, the felony of unlawfully and knowingly transporting a certain stolen vehicle in interstate commerce and at the time the said Defendant so transported the said automobile he then and there well knew that same was stolen in violation of Section 2312, Title 18, U.S.C.; and said judgment and conviction thereon occurred and became

[fol. 38] final, prior to the commission of the offenses hereinbefore alleged in and by the First Four Counts of this indictment upon an indictment then legally pending in said last named Court, of which the said Court had jurisdiction; said conviction was and is final; and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. 12,234 Criminal, in the United States District Court for the Northern District of Texas, Dallas Division, under the name of William Everett Reed.

Quash

SIXTH COUNT: AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present that prior to the commission of the offenses alleged in and by the First Four Counts of this indictment, he, the said William Everett Reed, was duly and legally convicted of a felony offense less than capital, to-wit, on the 2nd day of December, 1949, in the United States District Court for the Eastern District of Kentucky, in a case in said Court numbered 7737, and entitled United States of America vs. William Everett Reed, the said William Everett Reed was duly and legally convicted of a felony as aforesaid, a felony of escaping from the United States Public Health Service Hospital, in violation of Section 261(b), Title 42, U.S.C.; and said judgment and conviction thereon occurred and became final, prior to the commission of the offenses hereinbefore alleged in and by the First Four Counts of this indictment upon an information then legally pending in said last named Court, of which the said Court had jurisdiction; [fol. 39] said conviction was and is final; and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. 7737, in the United States District Court for the Eastern District of Kentucky, under the name of William Everett Reed.

FIFTH COUNT: AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present that prior to the commission of the offenses alleged in and by the First Four Counts of this indictment, he, the said William Everett Reed, was duly and

legally convicted of a felony less than capital, to-writ, on the 19th day of May, 1949, in the Criminal District Court No. 2 of Dallas County, Texas, in a case in said Court numbered 5387-BA and entitled the State of Texas vs. William Everett Reed, the said William Everett Reed, was duly and legally convicted of a felony as aforesaid, to-wit, unlawful possession of narcotics; and said judgment and conviction thereon occurred and became final prior to the commission of the offenses hereinbefore alleged in and by the first Four counts of this indictment upon an indictment then legally pending in the said last named Court, of which the said Court had jurisdiction; said conviction was and is the same person who was convicted in Cause Number 5387-BA in the Criminal District Court No. 2 of Dallas County, Texas, under the name of William Everett Reed.

SIXTH COUNT: AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present that prior to the commission of the offenses alleged [fol. 40] in and by the first four counts of this indictment, he, the said William Everett Reed, was duly and legally convicted of a felony less than capital, to-wit, on the 19th day of May, 1949, in the Criminal District Court No. 2 of Dallas County, Texas, in a case in said Court numbered 5423-BA and entitled the State of Texas vs. Williams Everett Reed, the said William Everett Reed, was duly and legally convicted of a felony as aforesaid, to-wit, theft of corporeal personal property of the value of Fifty (\$50.00) Dollars or over; and said judgment and conviction thereon occurred and became final prior to the commission of the offenses hereinbefore alleged in and by the first four counts of this indictment upon an indictment then legally pending in the said last named Court, of which the said Court had jurisdiction; said conviction was and is final, and he, the said William Everett Reed, was and is the same person who was convicted in Cause Number 5423-BA in the Criminal District Court No. 2 of Dallas County, Texas, under the name of William Everett Reed.

SEVENTH COUNT: AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present that prior to the commission of the offenses alleged

in and by the first four counts of this indictment, he, the said William Everett Reed, was duly and legally convicted of a felony less than capital, to-wit, on the 19th day of May, 1949, in the Criminal District Court of Dallas County, Texas, in a case in said Court numbered 5992-A and [fol. 41] entitled the State of Texas vs. William Everett Reed, the said William Everett Reed, was duly and legally convicted of a felony as aforesaid, to-wit, theft of corporeal personal property of the value of Fifty (\$50.00) Dollars or over; and said judgment and conviction thereon occurred and became final prior to the commission of the offenses hereinbefore alleged in and by the first four counts of this indictment upon an indictment then legally pending in the said last named Court, of which the said Court had jurisdiction; said conviction was and is final, and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. 5992-A in the Criminal District Court of Dallas County, Texas, under the name of William Everett Reed.

EIGHTH COUNT: AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present that prior to the commission of the offenses alleged in and by the first nine counts of this indictment, he, the said William Everett Reed, was duly and legally convicted of a felony less than capital, to-wit, on the 20th day of June, 1947, in the Criminal District Court No. 2 of Dallas County, Texas, in a case in said Court numbered 2781-BA and entitled The State of Texas vs. William Everett Reed, the said William Everett Reed, was duly and legally convicted of a felony as aforesaid, to-wit, the offense of theft over \$50.00, a felony less than capital; and said judgment and conviction thereon occurred and became final prior to the commission of the offenses hereinbefore alleged in and by the first nine [fol. 42] counts of this indictment upon an indictment then legally pending in the said last named Court, of which the said Court had jurisdiction; and conviction was and is final; and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. 2781-BA in the Criminal District Court No. 2 of Dallas County, Texas, under the name of William Everett Reed.

NINTH COUNT: AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present that prior to the commission of the offenses alleged in and by the first ten counts of this indictment, he, the said William Everett Reed, was duly and legally convicted of a felony less than capital, to-wit, on the 5th day of June, 1947, in the 59th Judicial District Court of Collin County, Texas, in a case in said Court numbered A-7525, and entitled The State of Texas vs. William Everett Reed, the said William Everett Reed, was duly and legally convicted of a felony as aforesaid, to-wit, the offense of burglary and attempt to commit burglary, a felony less than capital; and said judgment and conviction thereon occurred and became final prior to the commission of the offenses hereinbefore alleged in and by the first ten counts of this indictment upon an indictment then legally pending in the said last named Court, of which the said Court had jurisdiction; said conviction was and is final; and he, the said William Everett Reed, was and is the same person who was convicted in Cause No. A-7525 in the 59th Judicial District Court of Collin County, Texas, under [fol. 43] the name of William Everett Reed.

against the peace and dignity of the State.

/s/ JOHN E. WILLIAMS
Foreman of the Grand Jury

ENDORSED No. 11,416-C

THE STATE OF TEXAS vs. WILLIAM EVERETT REED
INDICTMENT

Offense: Burglary and Habitual Criminal
Stanley C. Kirk, District Attorney

John E. Williams, Foreman of the Grand Jury

Filed: March 9th, 1961, 7:15 PM

Amount of Bail: \$10,000.00

FLORA COBB, Clerk, District Courts
Wichita County, Texas

AFFIDAVIT EXHIBIT No. 5

**IN THE 89TH DISTRICT COURT
OF WICHITA COUNTY, TEXAS**

No. 11,416-C

THE STATE OF TEXAS

vs.

WILLIAM EVERETT REED

Filed: March 14, 1961.

CHARGE OF THE COURT

In this case the Defendant is charged by Indictment with the offense of Burglary alleged to have been committed on the 14th day of March, 1960, in Wichita County, Texas; also, in the same Indictment, he is charged with having twice been previously convicted of a felony less than capital.

To which charge the Defendant has pleaded "Not guilty".

1.

The offense of BURGLARY is constituted by entering a house by force, threats, or fraud with the intent to commit the crime of theft.

[fol. 44]

2.

The term ENTERING means every kind of an entry except one made by the free consent of the owner or occupant of the house or one authorized to give such consent.

The term BREAKING means that the entry must be made by actual force, but the slightest force is sufficient to constitute breaking. It may be by prying a lock and opening a door.

A HOUSE is any building or structure erected for public or private use, and of whatever material it might be constructed.

3.

THEFT is the fraudulent taking of corporeal personal property belonging to another from his possession or from the possession of someone holding the same for him without his consent and with the intent to deprive the owner of the value of said property and with the intent to appropriate it to the benefit of the person taking the same.

4.

By the term *FRAUDULANT TAKING* is meant that the person knew at the time of the taking that the property was not his own; that the property was taken without the consent of the owners; that the property taken with the intent to deprive the owner of the value thereof and to appropriate it to the use and benefit of the person taking it.

5.

Any person who has the care, custody and management [fol. 45] of said property is deemed in law to be in possession thereof, and any person who is in possession of the house or property is in law deemed to be the owner thereof.

6.

The punishment for the crime of burglary is by confinement in the State Penitentiary for any term of years not less than two nor more than twelve years.

7.

Now, therefore, if you find from the evidence beyond a reasonable doubt that William Everett Reed on or about the 14 day of March, 1960, in Wichita County, Texas, did then and there unlawfully, by force, threats and fraud break and enter a house there situated and controlled by one Ernest Guffey, hereinafter called owner, without the owner's consent, and then and there with the intent of the Defendant to *fraudulantly* take, steal, and carry away from and out of said house the corporeal

personal property then and therein said house belonging to said owner from the possession of said owner, without the consent of said owner of said corporeal property with the intent to deprive the owner of the value thereof and with the intent to appropriate the same to the use and benefit of him, the said William Everett Reed, you will find the Defendant guilty of Burglary and assess his punishment at confinement in the penitentiary for a term of years not less than two nor more than twelve. Unless you do so find, or if you have a reasonable doubt thereof, you will find the Defendant not guilty.

[fol. 46]

8.

In the Second and Tenth Count of the Indictment, it is charged that the Defendant has two time been duly and legally convicted of a felony less than capital. You are charged as a matter of law that in determining whether or not the Defendant is guilty of the offense of Burglary alleged to have been committed on or about the 14th day of March, 1960, as charged in the First Count of the Indictment, you must not consider for any purpose the allegations in the Indictment that he has twice been previously convicted of a felony less than capital, if you so find, or any evidence that might have been introduced before you tending to show that he was so convicted.

9.

If you have heretofore found the Defendant guilty of Burglary as charged in the First Count of the Indictment herein and you further find beyond a reasonable doubt that, before the commission of the offense charged in the First Count of this Indictment herein, William Everett Reed was twice previously convicted of a felony less than capital, to-wit, on the 15th day of March, 1954, in the Criminal District Court No. 2, of Dallas County, Texas, in a cause in the said Court numbered 5201-H entitled THE STATE OF TEXAS VS. WILLIAM EVERITT REED, and William Everett Reed was duly and legally convicted in the last named court of the felony of Burglary; and, on the 20th day of June, 1947 in

the Criminal District Court No. 2 of Dallas County, [fol. 47] Texas, in cause number 2781-BA entitled THE STATE OF TEXAS VS. WILLIAM EVERETT REED, the said William Everett Reed was duly and legally convicted in the last named Court of the felony of Theft Over \$50.00, which conviction occurred and a judgment thereon became final prior to the commission of the offense for which the said William Everett Reed was convicted in cause number 5201-H in the Criminal District Court No. 2 of Dallas County, Texas; and the said convictions in cause number 5201-H in the Criminal District Court No. 2 of Dallas County, Texas, and in cause number 2781-BA in the Criminal District Court No. 2 of Dallas County, Texas, occurred and the judgments thereon became final prior to the commission of the offense hereinabove alleged to have occurred on or about the 14th day of March, 1960, upon Indictments then legally pending in said Courts of which said courts had jurisdiction and convictions were final, and he, the said, William Everett Reed, was and is the same person who was convicted in cause number 5201-H in the Criminal District Court No. 2 of Dallas County, Texas, on March 15, 1954, under the name of William Everitt Reed and in cause number 2781-BA in the *Criminal* District Court No. 2 of Dallas County, Texas, on the 20th day of June, 1947, under the name of William Everett Reed, then you must find the Defendant guilty of having been twice previously convicted.

10.

In all criminal cases the Defendant has the right to [fol. 48] take the stand and testify as a witness in his own behalf, but in the event that he does not do so, such failure to so testify is not to be considered as any circumstance or evidence against him and you are therefore instructed that you must not discuss, refer to, or comment upon the failure of the Defendant to testify as a witness in this case.

11.

You are instructed that the Grand Jury Indictment is not evidence of guilt. It is the means whereby the De-

fendant is brought to trial in a felony prosecution. It is not evidence nor can it be considered by you in passing upon the innocence or guilt of this Defendant.

12.

In all criminal cases the Defendant is presumed to be innocent and the burden of proof is upon the State to establish his guilt by legal and competent evidence to the satisfaction of the jury beyond a reasonable doubt; and if in this cause, you have a reasonable doubt as to the guilt of the Defendant, you will acquit him and say by your verdict "Not Guilty".

13.

You are the exclusive judges of the facts proven, the credibility of the witnesses, and the weight to be given to their testimony; but the law of the case you will receive from the Court's Charge and be governed thereby.

/s/ GRAHAM B. PURCELL JR.,
Judge



[fol. 49]

AFFIDAVIT EXHIBIT NO. 6**IN THE 89TH DISTRICT COURT
OF WICHITA COUNTY, TEXAS****No. 11,416-C****BURGLARY AND HABITUAL CRIMINAL****THE STATE OF TEXAS***vs.***WILLIAM EVERETT REED****JUDGMENT**

ON THIS the 14th day of March, the above entitled and numbered cause was called for trial, and the State appeared by her District Attorney, and the Defendant, William Everett Reed, appeared in person, in open court, his counsel, Don Wilson, also being present and having been duly arraigned in open court, and having pleaded "not guilty" to the charge contained in the indictment herein, both parties announced ready for trial; thereupon, a jury of good lawful men, to-wit, Maurice Jones and eleven others, was duly selected, impaneled and sworn, who having heard the indictment read, and the Defendant's plea of "not guilty" thereto, heard all of the evidence submitted with the Defendant being present at all times; after both sides had closed, and the Court had prepared its charge, but before the charge was presented to the jury, the Defendant voluntarily absented himself from said trial; and after the court, the District Attorney and the Defendant's counsel made all reasonable efforts to locate the Defendant, the jury was charged by the Court, retired in charge of the proper officer to consider their verdict, and afterward was brought into open court by the proper officer, the Defendant's counsel being present, and [fol. 50] in due form of law returned into open court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court:

"We, the jury, find the Defendant guilty of burglary as charged in the first count of the indictment herein, and we further find he was twice heretofore been convicted of a felony less than capital as charged in the second and tenth counts of the indictment."

MAURICE JONES, Foreman of the Jury

IT IS THEREFORE, CONSIDERED AND ADJUDGED by the Court that the Defendant, William Everett Reed, is guilty of the offense of burglary and habitual criminal as found by the jury, and that he be punished as has been determined by the jury by confinement for a term of life, and that the State do have and recover of the said Defendant, William Everett Reed, all costs in the prosecution expended, for which let execution issue.

The Defendant's attorney did then and there in open court give notice of appeal to the Court of Criminal Appeals sitting at Austin, Texas.

/s/ GRAHAM B. PURCELL, JR.,
Judge

ENDORSE:

No. 11,416-C

THE STATE OF TEXAS vs. WILLIAM EVERETT REED
JUDGMENT

Issued: March 20, 1961

Recorded: Vol. 5, Pages 278-79, Criminal Minutes
of the 89th District Court, Wichita County, Texas
FLORA COBB, Clerk, District Courts
Wichita County, Texas

[fol. 51]

AFFIDAVIT EXHIBIT No. 7

CRIMINAL DISTRICT COURT NO.
DALLAS COUNTY

JANUARY TERM, 1954

No. 4561-IH March 15, 1954

THE STATE OF TEXAS

v/s.

WILLIAM EVERITT REED

THIS DAY this cause was called for trial and the State appeared by her Criminal District Attorney, and the defendant William Everitt Reed appeared in person, his counsel also being present and both parties announced ready for trial, and the defendant and District Attorney of Dallas County, Texas, having agreed and requested in writing, as required by law, that the defendant be tried before the Court without a jury, and the court having agreed, the defendant in open Court in person pleaded "Guilty" to the charge contained in the indictment; thereupon the said defendant was admonished by the Court of the consequences of said plea, and the said defendant persisted in pleading guilty; and it plainly appearing to the Court that the defendant is sane, and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty is by the Court received and here now entered of record upon the minutes of the Court as the plea herein of said defendant, thereupon the indictment being presented and the defendant having pleaded guilty thereto, and the Court having heard the indictment read and the [fol. 52] defendant's plea of guilty thereto, and having heard the evidence submitted is of the opinion from the evidence submitted that the defendant is guilty as charged.

IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT, That the said Defendant is

guilty of the offense of Theft of Corporeal Personal Property of the value of \$50.00 or Over as confessed by him in his said plea of guilty herein made, and that he be punished by confinement in the penitentiary for 10 years, and that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue; and that said defendant be remanded to the Sheriff of Dallas County, Texas, to await the further order of the Court herein.

AFFIDAVIT EXHIBIT No. 8

No. 4561-IH March 15, 1954

THE STATE OF TEXAS

vs.

WILLIAM EVERITT REED

SENTENCE

THIS DAY this cause being again called, the State appeared by her Criminal District Attorney, and the Defendant, William Everitt Reed was brought into open Court in person, in charge of the Sheriff, for the purpose of having sentence of law pronounced in accordance with the judgment herein rendered and entered against him at a former time of this term; and thereupon the said Defendant, was asked by the Court whether he had anything [fol. 53] to say why sentence should not be pronounced against him, and he answered nothing in bar thereof, whereupon the Court proceeded, in the presence of the said Defendant, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT, that the said Defendant, who has been adjudged to be guilty of Theft of Corporeal Personal Property of the value of \$50.00 or Over, and whose punishment has been assessed by the Court at confinement in the penitentiary for 10 years,

be delivered by the Sheriff of Dallas County, Texas, immediately, to the Superintendent of the Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said penitentiaries, for not less than 2 nor more than 10 years, in accordance with the provisions of the law governing the Penitentiaries of said State, and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence. Back time allowed. Sentence to begin Oct. 6, 1953. Sentence to run concurrently with Federal time. Released to Federal Authorities 3-24-54.

THE STATE OF TEXAS :
COUNTY OF DALLAS :

I, BILL SHAW, Clerk of Criminal District Court of Dallas County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the Judgment and Sentence of the Court rendered and entered in the case of THE STATE OF TEXAS vs. William Everitt Reed, No. 4561-IH, as the same appears of record in Book [fol. 54] 38, pages 574, Minutes of the Court.

WITNESS my official Seal and Signature at my office in the City of Dallas, Dallas County, Texas, this 11th day of January, A.D. 1961.

BILL SHAW
Clerk Criminal District Courts,
Dallas County, Texas

By /s/ LOIS FEAGIN, Deputy
(LOIS FEAGIN)

JUDGE'S CERTIFICATE

THE STATE OF TEXAS :
COUNTY OF DALLAS :

I, HENRY KING, Judge of the Criminal District Court of the State of Texas, in Dallas County, do hereby certify,

that Bill Shaw, whose genuine signature appears signed to the Certificate below, is the duly elected, qualified and acting Clerk of said Court, and was at the time of so signing same, and that said Certificate is in due form of law.

IN TESTIMONY of all of which I hereunto sign my name and affix my official seal at office in the City of Dallas, Dallas County, Texas, on this the 27th day of February, A.D. 1961.

/s/ HENRY KING
Judge of the ——District Court,
Dallas County, Texas

(Seal)

CLERK'S CERTIFICATE

THE STATE OF TEXAS :
COUNTY OF DALLAS :

I, BILL SHAW, Clerk of the District Courts, within [fol. 55] and for the County of Dallas, and State of Texas, do hereby certify that Judge HENRY KING, Criminal District Court No. 2 whose genuine signature appears signed to the above and foregoing Certificate is the duly elected, qualified and acting Judge of said Court, and was at the time of so signing same, and that said Certificate is in due form of law.

IN TESTIMONY OF ALL OF WHICH I hereunto sign my name and affix my official seal at office, in the City of Dallas, Dallas County, Texas, on this the 27th day of Feb. A. D. 1961.

BILL SHAW
Clerk of the District Courts of
Dallas County, Texas

/s/ BILL SHAW

(Seal)

AFFIDAVIT EXHIBIT NO. 9

Page 109 Lines 14-25

(Whereupon the document referred to was marked as State's Exhibit No. 8.)

MR. KIRK: This is a certified and exemplified copy of the indictment, judgment and sentenced in cause No. 4561-IH styled the State of Texas vs. William Everitt Reed dated March 15, 1954 which instruments have been certified to by Judge Henry King, Judge of the District Court of Dallas County, Texas, and his signature is certified to by Bill Shaw, Clerk of the District Courts of Dallas County, Texas. Such indictments reading as [fol. 56] follows:

(Reads State's Exhibit 8 to jury)

Page 110 Lines 1-17

MR. KIRK: Now the State introduces the judgment and sentence in its entirety but in the interest of time and brevity let the record show that the Defendant William Everitt Reed was adjudged guilty of the offense of theft of corporeal personal property of the value of over fifty dollars on March 15, 1954, and the sentence, in the same entitled and numbered cause reads as follows:

(Reads sentence to the jury) The name Everitt in this sentence and the indictment are spelled E-v-e-r-i-t-t.

MR. KIRK: The State introduces such instrument as its exhibit No. 8.

MR. WILSON: We renew our objection on the lack of foundation and also move for a mistrial on the ground that a reference to federal time is unauthorized comment on another conviction.

THE COURT: Overrule the objection.

MR. WILSON: Note our exception.

AFFIDAVIT EXHIBIT No. 10

CRIMINAL DISTRICT COURT NO. ———,
DALLAS COUNTY

APRIL TERM, 1947

No. 2781-BA June 20, 1947

THE STATE OF TEXAS

vs.

WILLIAM EVERETT REED

THIS DAY this cause was called for trial and the [fol. 57] State appeared by her Criminal District Attorney, and the defendant William Everett Reed appeared in person, his counsel also being present and both parties announced ready for trial, and the defendant and District Attorney of Dallas County, Texas, having agreed and requested in writing, as required by law, that the defendant be tried before the Court without a jury, and the court having agreed, the defendant in open Court in person pleaded "Guilty" to the charge contained in the indictment; thereupon the said defendant was admonished by the Court of the consequences of said plea, and the said defendant persisted in pleading guilty; and it plainly appearing to the Court that the defendant is sane, and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty is by the Court received and here now entered of record upon the minutes of the Court as the plea herein of said defendant, thereupon the indictment being presented and the defendant having pleaded guilty thereto, and the Court having heard the indictment read and the defendant's plea of guilty thereto, and having heard the evidence submitted is of the opinion from the evidence submitted that the defendant is guilty as charged.

IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT, That the said Defendant is

guilty of the offense of Theft Over \$50.00 as confessed by him in his said plea of guilty herein made, and that he be punished by confinement in the penitentiary for 2 years, [fol. 58] and that the State of Texas do have and recover of the said defendant all costs of this prosecution expended, for which execution will issue; and that said defendant be remanded to the Sheriff of Dallas County, Texas, to await the further order of the Court herein.

SENTENCE

No. 2781-BA June 20, 1947

THE STATE OF TEXAS

vs.

WILLIAM EVERETT REED

Theft Over \$50.00

THIS DAY this cause being again called, the State appeared by her Criminal District Attorney, and the Defendant, William Everett Reed was brought into open Court in person, in charge of the Sheriff, for the purpose of having sentence of the law pronounced in accordance with the judgment herein rendered and entered against him at a former time of this term; and thereupon the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar therof, whereupon the Court proceeded, in the presence of the said Defendant, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT, That the said Defendant, who has been adjudged to be guilty of Theft Over \$50.00 and whose punishment has been assessed by the Court at confinement in the penitentiary for 2 years, be delivered by the Sheriff of Dallas County, Texas, [fol. 59] immediately, to the Superintendent of the Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant

shall be confined in said penitentiaries, for 2 years, in accordance with the provisions of the law governing the Penitentiaries of said State, and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence. Sentence to begin June 5, 1947.

THE STATE OF TEXAS :
COUNTY OF DALLAS :

I, BILL SHAW, Clerk of Criminal District Court of Dallas County, Texas, do hereby certify that the above and forgoing is a true and correct copy of the Judgment and Sentence of the Court rendered and entered in the case of THE STATE OF TEXAS vs. William Everett Reed, No. 2781-BA, as the same appears of record in Book 31, Pages 289, Minutes of the Court.

WITNESS my official Seal and Signature at my office in the City of Dallas, Dallas County, Texas, this 11th day of January A.D. 1961

BILL SHAW
Clerk Criminal District Courts,
Dallas County, Texas

By /s/ LOIS FEAGIN, Deputy
(LOIS FEAGIN)

JUDGE'S CERTIFICATE

THE STATE OF TEXAS :
COUNTY OF DALLAS :

I, HENRY KING, JUDGE of the Criminal District [fol. 60] Court of the State of Texas, in Dallas County, do hereby certify, that Bill Shaw, whose genuine signature appears signed to the Certificate below, is the duly elected, qualified and acting Clerk of said Court, and

was at the time of so signing same, and that said Certificate is in due form of law.

IN TESTIMONY of all of which I hereunto sign my name and affix my official seal at office in the City of Dallas, Dallas County, Texas, on this the 27th day of February A.D. 1961

/s/ HENRY KING
Judge of the District Court,
Dallas County, Texas

{ (Seal)

CLERK'S CERTIFICATE

THE STATE OF TEXAS :
COUNTY OF DALLAS :

I, BILL SHAW, Clerk of the District Courts, within and for the County of Dallas, and State of Texas, do hereby certify that Judge Henry King, Criminal District Court No. 2 whose genuine signature appears to the above and foregoing Certificate is the duly elected, qualified and acting Judge of said Court, and was at the time of so signing same, and that said Certificate is in due form of law.

IN TESTIMONY OF ALL OF WHICH I hereunto sign my name and affix my official seal at office, in the City of Dallas, Dallas County, Texas, on this the 27th day of February A.D. 1961.

BILL SHAW
Clerk of the District Courts of
Dallas County, Texas

/s/ BILL SHAW

{ (Seal)

[fol. 61]

**AFFIDAVIT EXHIBIT NO. 11 BEING PORTION OF TESTIMONY
APPEARING IN STATEMENT OF FACTS IN CAUSE 33,987**

MR. KIRK: The State introduces as its Exhibit No. 16 certified and exemplified copies of the indictment, judgment and sentence in cause No. 2781-BA Criminal District Court No. 2 of Dallas County, Texas, styled The State of Texas vs. William Everett Reed. The indictment alleges that the Defendant therein William Everett Reed on or about the 28th day of March, 1947, stole one automobile truck of the value of over fifty dollars such corporeal personal property belonging to W. M. Neipp. The judgment and sentence are dated November 20, 1947 and show that the Defendant was convicted of the offense of Theft over fifty dollars and was sentenced to two years in the State Penitentiary.

MR. WILSON: We make our same objection on lack of foundation and lack of identification with this Defendant.

THE COURT: Overruled.

MR. KIRK: Mark that one please?

(Whereupon the document referred to was marked as State's Exhibit No. 16).

AFFIDAVIT EXHIBIT NO. 12

**CRIMINAL DISTRICT COURT NO. —————,
DALLAS COUNTY
JANUARY TERM, 1954**

No. 5201-H March 15, 1954

THE STATE OF TEXAS

vs.

WILLIAM EVERITT REED

**THIS DAY this cause was called for trial and the
[fol. 62] State appeared by her Criminal District Attor-**

ney, and the defendant William Everitt Reed appeared in person, his counsel also being present, and both parties announced ready for trial, and the defendant and District Attorney of Dallas County, Texas, having agreed and requested in writing, as required by law, that the defendant be tried before the Court without a jury, and the court having agreed, the defendant in open Court in person pleaaed "Guilty" to the charge contained in the indictment; thereupon the said defendant was admonished by the Court of the consequences of said plea, and the said defendant persisted in pleading guilty; and it plainly appearing to the Court that the defendant is sane, and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty is by the Court received and here now entered of record upon the minutes of the Court as the plea herein of said defendant, thereupon the indictment being presented and the defendant having pleaded guilty thereto, and the Court having heard the indictment read and the defendant's plea of guilty thereto, and having heard the evidence submitted is of the opinion from the evidence submitted that the defendant is guilty as charged.

IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT, That the said Defendant is guilty of the offense of Burglary as confessed by him in his said plea of guilty herein made, and that he be punished by confinement in the penitentiary for 10 years, [fol. 63] and that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue; and that said defendant be remanded to the Sheriff of Dallas County, Texas, to await the further order of the Court herein.

THE STATE OF TEXAS :
COUNTY OF WALKER :

I, J. C. Roberts, HEREBY CERTIFY THAT I AM
THE Record Clerk of the Texas Department of Cor-

rections, a penal institution of the State of Texas, situated in the County and State aforesaid. That in my legal Custody as such officer are the original files and records of persons heretofore committed to said institution; that the (X) photograph (X) fingerprints and (X) commitments attached hereto are copies of the original records or William Everitt Reed #138706 a person heretofore committed to said penal institution and who served a term of imprisonment therein; that I have compared the attached copies with their respective originals now on file in my office and each thereof contains, and is a full, true, and correct transcript and copy from its said original.

IN WITNESS WHEREOF, I have hereunto set my hand seal this 28th day of February, 1961.

/s/ J. C. ROBERTS, Record Clerk

THE STATE OF TEXAS :
COUNTY OF WALKER :

I, Amos A. Gates PRESIDING JUDGE OF THE COUNTY COURT, do hereby certify that J. C. Roberts, [fol. 64] whose name is subscribed to the above certificate, was at the date thereof, and is now Record Clerk of the Texas Department of Corrections, and is the legal keeper and the officer having the legal custody of the original records of the said Texas Department of Corrections; that the said certificate is in due form and that the signature subscribed thereto is his genuine signature.

IN WITNESS WHEREOF, I have hereunto subscribed my name in my official character as such Judge, in the County and State aforesaid, this the 28th day of February, 1961.

/s/ AMOS A. GATES, Judge
of the County Court,
Walker County, Texas

THE STATE OF TEXAS :
COUNTY OF WALKER :

I, J. L. Ferguson, CLERK OF THE COUNTY COURT of the County of Walker, State of Texas, which Court is a court of records having a seal which is annexed hereto, do certify that Amos A. Gaes whose name is subscribed to the foregoing certificate of the due attestation, was at the aforesaid subscribing, the same judge of the county court aforesaid, and was duly commissioned, qualified and authorized by LAW to execute the said certificate, and I do further certify that the signature of the above named judge of the said certificate of due attestation is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and annexed the seal of the County Court at my [fol. 65] office in said county, this the 28th day of February, 1961.

/s/ J. L. FERGUSON, Clerk
County Court, Walker County,
Texas
(Seal)

SENTENCE

No. 5201-H March 15, 1954

THE STATE OF TEXAS

vs.

WILLIAM EVERITT REED

Burglary

THIS DAY this cause being again called, the State appeared by her Criminal District Attorney, and the Defendant, William Everitt Reed was brought into open Court in person, in charge of the Sheriff, for the purpose of having sentence of the law pronounced in accordance with the judgment herein rendered and entered against him on a former day of this term; and thereupon the said Defendant, was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof,

whereupon the Court proceeded, in the presence of the said Defendant, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT, That the said Defendant, who has been adjudged to be guilty of Burglary and whose punishment has been assessed by the Court at confinement in the penitentiary for 10 years, be delivered by the Sheriff of Dallas County, Texas, immediately, to the Superintendent of the Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant shall be con-[fol. 66] fined in said Penitentiaries not less than 2 nor more than 10 years, in accordance with the provisions of the law governing the Penitentiaries of said State, and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence. Back time allowed. Sentence to begin Oct. 16, 1953. Sentence to run concurrently with Federal time.

Released to Federal Authorities 3-24-54.

THE STATE OF TEXAS :
COUNTY OF DALLAS :

I, BILL SHAW, Clerk of Criminal District Court of Dallas County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the Judgment and Sentence of the Court rendered and entered in the case of THE STATE OF TEXAS vs. William Everitt Reed, No. 5201-H as the same appears of record in Book 38, pages 575, Minutes of the Court.

WITNESS my official Seal and Signature at my office in the City of Dallas, Dallas County, Texas, this 24th day of March A.D. 1954.

BILL SHAW
Clerk Criminal District Courts,
Dallas County, Texas

By /s/ HARRY WHITE, Deputy
HARRY WHITE

CRIMINAL DISTRICT COURT NO. ———,
DALLAS COUNTY

JANUARY TERM, 1954

No. 4561-IH March 15, 1954

THE STATE OF TEXAS

vs.

WILLIAM EVERITT REED

THIS DAY this cause was called for trial and the State [fol. 67] appeared by her Criminal District Attorney, and the Defendant William Everitt Reed appeared in person, his counsel also being present and both parties announced ready for trial, and the defendant and District Attorney of Dallas County, Texas, having agreed and requested in writing, as required by law, that the defendant be tried before the Court without a jury, and the court having agreed, the defendant in open Court in person pleaded "Guilty" to the charge contained in the indictment; thereupon the said defendant was admonished by the Court of the consequences of said plea, and the said defendant persisted in pleading guilty; and it plainly appearing to the Court that the defendant is sane, and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty is by the Court received and here now entered of record upon the minutes of the Court as the plea herein of said defendant, thereupon the indictment being presented and the defendant having pleaded guilty thereto, and the Court having heard the indictment read and the defendant's plea of guilty thereto, and having heard the evidence submitted is of the opinion from the evidence submitted that the defendant is guilty as charged.

IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT, That the said Defendant is guilty of the offense of Theft of Corporeal Personal Property of the value of \$50.00 or over as confessed by him in his said plea of guilty herein made, and that he be

[fol. 68] punished by confinement in the penitentiary for 10 years, and that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue; and that said defendant be remanded to the Sheriff of Dallas County, Texas, to await the further order of the Court herein.

SENTENCE

No. 4561-IH March 15, 1954

THE STATE OF TEXAS

vs.

WILLIAM EVERITT REED

Theft of Corporeal Personal Property of the value of \$50.00 or over:

THIS DAY this cause being again called, the State appeared by her Criminal District Attorney, and the Defendant, William Everitt Reed was brought into open Court in person, in charge of the Sheriff, for the purpose of having sentence of the law pronounced in accordance with the judgment herein rendered and entered against him on a former day of this term; and thereupon the said Defendant, was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof, whereupon the Court proceeded, in the presence of the said Defendant, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT, That the said Defendant, who has been adjudged to be guilty of Theft [fol. 69] of Corporeal Personal Property of the value of \$50.00 or over, and whose punishment has been assessed by the Court at confinement in the penitentiary for 10 years, be delivered by the Sheriff of Dallas County, Texas, immediately, to the Superintendent of the Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said penitentiaries, for not less than 2 nor more

than 10 years, in accordance with the provisions of the law governing the Penitentiaries of said State, and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence. Back time allowed. Sentence to begin Oct. 6, 1953. Sentence to run concurrently with Federal time. Released to Federal Authorities 3-24-54.

THE STATE OF TEXAS :
COUNTY OF DALLAS :

I, BILL SHAW, Clerk of Criminal District Court of Dallas County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the Judgment and Sentence of the Court rendered and entered in the case of THE STATE OF TEXAS vs. William Everitt Reed, No. 4561-IH as the same appears of record in Book 38, Pages 574, Minutes of the Court.

WITNESS my official Seal and Signature at my office in the City of Dallas, Dallas County, Texas, this 3rd day of May A.D. 1954.

BILL SHAW
Clerk Criminal District Courts,
Dallas County, Texas

By /s/ HARRY WHITE Deputy
HARRY WHITE

[fol. 70]

AFFIDAVIT EXHIBIT No. 13 BEING PORTION OF TESTIMONY
APPEARING IN STATEMENT OF FACTS IN CAUSE 33,987

BY MR. KIRK:

Q Lieutenant, I wish you would look at these instruments and see if you have ever looked at and examined them before?

A Yes, sir.

Q Do you recall about when that was?

A March 8, 1961.

Q Do you—

MR. WILSON: Lieutenant, how did this come into your possession?

A It was sent to my office from the District Attorney's office.

Q And you received it from the District Attorney's office?

A Yes, sir.

MR. WILSON: I object on the lack of foundation on this instrument.

THE COURT: Overrule the objection.

MR. WILSON: Note our exception.

MR. KIRK: The State introduces as its exhibit No. 10, the *committment* papers of William Everitt Reed in Cause No. 5201-H dated March 15, 1954 in the Criminal District Court No. 2 of Dallas County, Texas, and in cause No. 4561 styled the State of Texas vs. William Everitt Reed, dated March 15, 1954, Dallas County, [fol. 71] Texas, together with his picture and finger print record, and such instruments have been certified, exemplified and authenticated by J. C. Roberts the Records Clerk of the Texas Department of Corrections a penal institution of the State of Texas and his signature is certified to and the fact that he is the records clerk is verified to by Amos A. Cates, County Judge of Walker County, Texas, and Judge Cates' authority and signature is certified and verified to by J.L. Ferguson the County Clerk of Walker County, Texas.

(Whereupon the documents referred to were marked as State's Exhibit No. 10.)

BY MR. KIRK:

Q Lieutenant, have you ever made a finger print comparison between the finger prints which have been introduced as State's Exhibit No. 7 and the finger prints which have been introduced as State's Exhibit No. 10?

A I have.

Q In your opinion are they of one and the same person?

A They are.

Page 118—Lines 3 to 25
and

Page 119—Lines 1 to 10

Q All right sir have you made a comparison of the finger prints in State's Exhibit No. 11 with the finger [fol. 72] prints in State's Exhibit No. 7—12 and 7, I am sorry?

A I have.

Q In your opinion are they one and the same person?

A They are.

MR. KIRK: Do you want this in or out?

MR. WILSON: I am objecting to the alteration.

MR. KIRK: Oh you want it in we will leave that in it then. (Hands instrument to the jury.)

MR. KIRK: The State introduces as its Exhibit No. 13 a certified, exemplified authenticated copy of the indictment, judgment and sentence in cause No. 5387-BA in the Criminal District Court of Dallas County, Texas, being cause No. — being entitled The State of Texas vs. William Everett Reed. The exhibit bears the Judge's certificate and the clerk's certificate, the indictment, and although introduced in its entirety for the sake of brevity I will summarize it, it alleges the offense of possession of marihuana on or about the 5th day of October of 1958, signed by Richard H. McLancy I guess that is, Foreman of the Grand Jury. And the judgment and sentence in the same cause are dated May 19, 1949 and the Defendant is found guilty of the offense of unlawful possession of narcotics and they assessed a punishment of five years in the State Penitentiary.

MR. WILSON: We object to it on the grounds of lack of foundation and the lack of identification with this defendant.

THE COURT: Overrule the objection.
[fol. 73] MR. WILSON: Exception

(Whereupon the documents referred to were marked as State's Exhibit No. 13.)

IN THE UNITED STATES DISTRICT COURT
MOTION TO DISMISS—Filed: February 1st, 1964
TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Dr. George J. Beto, Respondent in the above numbered and entitled cause, and respectfully moves that the Court dismiss the petition for the following reasons:

I.

The petition does not state a cause of action upon which any relief can be granted by this Court.

II.

The petition and the exhibits thereto conclusively establish that the petition is wholly without merit.

III.

Respondent submits that the allegations of subparagraphs (a) and (b) of paragraph V of the petition, which are to the effect that there was no evidence to support the jury finding that Petitioner was the same person who had been previously convicted, is completely rebutted by the exhibits made a part of the petition.

The exhibits show that the method used to prove Petitioner's identity as the person previously convicted is the same as has been approved by the Court of Criminal Appeals of Texas in many cases. See *Broussard v. State*, 363 S.W. 2d 143 (Tex. Crim. App. 1962) and cases cited therein. The prosecution introduced certified copies of the judgment, sentence, commitment, fingerprint card and photograph of the defendant in each of the previous convictions. The fingerprint records and photographs were certified by the Records Clerk of the Texas Department of Corrections and were admissible without

further proof, Under the provisions of Art. 3731a, Tex. Civ. Stats., *Spencer v. State*, 300 S.W. 2d 950 (Tex. Crim. App. 1957). The prosecution then proved that the finger-prints of the persons previously committed were of the Petitioner, thus presenting the jury with both photographs of the person previously convicted and an expert opinion that the fingerprints were the same. Respondent submits that such a use of documentary evidence is wholly proper under the Constitution of the United States.

IV.

The allegations of subparagraph (c) of paragraph V of the petition are also without merit and do not state a cause of action upon which this Court can grant any relief.

The exhibits which accompany the petition show that the proof of the enhancement counts of the indictment prior to proof of the primary offense could not have harmed Petitioner. A reading of the trial court's charge (which is an exhibit to the petition) shows that the jury [fol. 75] was carefully instructed as to proper place such proof played in the case and the jury was instructed that the indictment itself was not evidence.

In addition, the copies of the State proceedings which accompany the petition clearly show that Petitioner has never raised the point presented by subparagraph (c) in the State Courts. The failure of Petitioner to exhaust the remedies available to him in the Courts of the State of Texas precludes the consideration of the allegations by this Court. 28 U.S.C.A. 2254; *Fay v. Noia*, 372 U.S. 391, 9 L. Ed. 2d 837, 83 Sup. Ct. 822 (1963).

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Court dismiss the petition herein.

Respectfully,

WAGGONER CARR
Attorney General of Texas

/s/ SAM R. WILSON
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT

PETITIONER'S BRIEF IN SUPPORT OF PETITION AND IN
OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

Filed: February 20, 1964

STATEMENT OF CASE

Petitioner was, on the 14th day of March, 1961, convicted in Cause No. 11,416-C in the District Court of Wichita County, of the primary offense of burglary, with two prior convictions of ordinary felonies. His punishment [fol. 76] was assessed at confinement in the Penitentiary in the State of Texas for life. From that conviction an appeal was perfected to the Court of Criminal Appeals, and became No. 33,987, on the docket of such Court. The conviction was duly affirmed by said Court and appears as *Reed vs. State*, 353 S.W. 2d 850. Relator was subsequently taken into custody and delivered to the Penitentiary of the State of Texas, began service of his sentence imposed, and remains there at the present time.

The Petitioner has now served on that sentence a total in excess of two years, as shown by the certificate of the Department of Corrections of the State of Texas, made as part of the record, and dated April 25, 1963.

It is Petitioner's contention that the only valid punishment authorized to be accessed against him under the record in the foregoing case, was the minimum punishment of two years confinement in the Penitentiary, for the crime of burglary, and that the assessment of a punishment for life in the Penitentiary is wholly null and void and utterly without support by the testimony.

Thereafter, as reflected by the Petition and the exhibits attached thereto, the Petitioner applied to the Court of Criminal Appeals for the State of Texas for a Writ of Habeas Corpus or Writ of Error Coram Nobis. As is further reflected by the Petition and supporting exhibits, such application was denied by the said Court of Criminal Appeals. Thereafter, Petitioner filed the subject [fol. 77] Petition for a Writ of Habeas Corpus in this Honorable Court.

The two prior convictions relied upon to enhance the punishment to life imprisonment as an habitual offender, were alleged as follows:

Count No. 2 charged that Petitioner had been on the 15th day of March, 1954, convicted in the Criminal District Court No. 2, of Dallas County, Texas, in Cause No. 4561-H, upon the docket of that Court, of felony theft. To sustain that allegation, the State relied upon the introduced into evidence a certified copy of a judgment and sentence rendered in the Criminal District Court No. —, Dallas County, No. 4561-H, upon the docket of that Court, which judgment follows the usual form applied in pleas of guilty in felony cases before the Court and without the intervention of a jury. The punishment assessed was ten years confinement in the Penitentiary in the State of Texas. *No where* in said judgment is found any reference to Criminal District Court No. 2 of Dallas County, Texas, as charged in the indictment. There is nothing in said judgment or the caption thereof which shows that the judgment was rendered in Criminal District Court No. 2 of Dallas County, Texas. To the contrary, all reference to the Court rendering the judgment is that of Criminal District Court No. — of Dallas County. There is, therefore, a fatal variance between the judgment alleged in the indictment and that relied upon to sustain that allegation.

[fol. 78] The sentence passed upon the judgment shows to have been printed on a single sheet of paper with the judgment and follows on that single sheet of paper the sentence. The sentence is in the usual form, provided by the Law of Texas. Other than to a reference that the sentence was being pronounced in open Court, there is no reference whatsoever to the fact that the sentence was being passed in and as being the sentence of the Criminal District Court No. 2 of Dallas County, Texas.

The certificate to the judgment and sentence made by Bill Shaw, Clerk of the Criminal District Courts of Dallas County, Texas, certified that the judgment and sentence "Is a true and correct copy of the judgment and sentence of the Court rendered and entered in the case of The State of Texas vs. William Everett Reed, No. 4561-H, as the same appears of record in Book 38, Page 574, Min-

utes of the Court". WHAT COURT? The Criminal District Court of Dallas County, Texas, of which Bill Shaw was the Clerk. Moreover, the certificate of Judge Henry King attached to the certified copy, certifies that Bill Shaw is the Clerk of the Criminal District Courts of Dallas County, Texas.

It is, therefore, the contention of the Petitioner that it is shown without contradiction, that the State of Texas, not only wholly failed to prove the allegation of former conviction as alleged in the indictment, but proved a former conviction in another and different Court.

The Court of Criminal Appeals and this Court judicially [fol. 79] know that there is a Criminal District Court of Dallas County, Texas, and a Criminal District No. 2 of Dallas County, Texas, because each Court is created by a statute of the State of Texas and is separate and distinct from each other. Article 52, C.C.P.

Such being the case, it is the contention of the Petitioner, there is no place here for an application of the rule on intent, that is that the State intended to allege in the indictment that the judgment and sentence were rendered in the Criminal District Court No. 2 of Dallas County, Texas, or that the Clerk in certifying to the judgment and sentence was in error, and intended to certify to the judgment and sentence as having been rendered in Criminal District Court No. 2, rather than in Criminal District Court of Dallas County, Texas.

As to the second prior conviction upon the State relied to enhance Petitioner's punishment as an habitual offender, the certified copy of the judgment and sentence offered in evidence to support such allegation, are in the exact situation as those heretofore set forth. Again, there is an utter absence of any proof that the judgment and sentence were rendered in the Criminal District Court No. 2 of Dallas County, Texas, as alleged in the indictment. All the instruments show that the judgment and sentence there certified, were rendered in the Criminal District Court of Dallas County, Texas.

It is therefore, the contention of the Petitioner that the State of Texas in the trial of this Petitioner in the [fol. 80] District Court of Wichita County, Texas, did not prove that Petitioner has been twice, prior thereto,

convicted on ordinary felonies as alleged in the indictment, and the judgment and sentence in that case insofar as it decrees Petitioner to be an habitual offender and assessing his punishment at confinement is absolutely and utterly void. Petitioner, having now served on that sentence an excess of two years, such being in excess of the minimum punishment authorized to be assessed for the crime of burglary as charged in the primary offense, Petitioner is, therefore, entitled to his discharge from further custody under that judgment and sentence.

As further reflected by the Petition and exhibits attached thereto and the admission of respondent in Paragraph 4 of his Motion to Dismiss, proof of the enhancement counts of the indictment presented in the District Court of Wichita County, Texas, as aforesaid, admitted in evidence in the trial of the subject cause in the said District Court of Wichita County, Texas, prior to the time guilt was determined as to the primary offense charged. It is the contention of the Petitioner that such procedure as authorized, required, and accomplished under the law of the State of Texas, constituted an unfair trial in violation of the Fourteenth Amendment to the Constitution of the United States. And further violates Petitioner's rights under the Fifth and Sixth Amendments to the Constitution of the United States in that such reading to the jury of those indictments relating [fol. 81] to the Petitioner's prior convictions destroyed the impartiality of the jury and thereby denied Petitioner due process of law.

PROPOSITION OF LAW NO. 1

THE FAILURE OF THE STATE OF TEXAS TO INTRODUCE ANY EVIDENCE TO SUSTAIN THE ALLEGATIONS OF THE INDICTMENT AS TO THE ENHANCEMENT COUNTS CONSTITUTED AN IMPRISONMENT OF PETITIONER WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Where the allegations of the indictment of prior convictions for the purpose of enhancing punishment stated

that the conviction had been had in a certain District Court, and the proof showed a conviction in another District Court there was a variance between the allegations and proof which was fatal to the conviction. Such variance constitutes fundamental error and is properly inquired into by the Court of Criminal Appeals without a Bill of Exceptions. *Corley v. State*, 254 S.W. 2d 394, and case cited therein. *Corely* involved an appeal from Dallas County and a discrepancy in the charge and the indictment and the proof involving the same Court as the case at Bar. The result of this situation is that actually there was *no evidence* to support a judgment and sentence of life in the Penitentiary. In *Ex parte Lyles*, 323 S.W. 2d 950, it was recognized that a collateral attack by habeas corpus may be made upon a judgment on the basis of no evidence. It seems obvious that the situation here presented is one of no evidence as that there was one of insufficient evidence. In *Ex Parte Burch*, [fol. 82] 267 S.W. 2d 560, it was held that a prosecution under Article 63 of the Penal Code of Texas does not create an offense of being an habitual criminal but is only an enhancement statute. In other words, it is a condition where an excess of punishment may be assessed upon proper evidence.

The rule as stated in *Corpus Juris Secundum*, Volume 39, Habeas Corpus, Section 26, Subsection E, is as follows:

"In case of an excessive sentence by waiver of authority, as much of the sentence as is excessive may be relieved against on a Habeas Corpus, after the valid part thereof has been served or satisfied. Such relief cannot be obtained from an oppressive or unduly severe sentence, which is still within statutory limits. (Citing cases)."

The foregoing rule is recognized in *Ex parte Pruitt*, 141 S.W. 2d 333; *Ex parte Daniels*, 252 S.W. 2d 586; *Ex parte Huff*, 316 S.W. 2d 896. In *Ex parte Puckett*, 310 S.W. 2d 117, it was held that where enhancement of sentence of relator because of prior conviction in Federal Court was invalid, and relator had served the maximum term for the second offense of felony theft, he was en-

titled to the discharge on his application for Writ of Habeas Corpus. The Court, in this case, was not only considering the sufficiency of the indictment which alleged a conviction for the National Motor Vehicle Theft Act in [fol. 83] Federal Court, but was also considering the question of no evidence to show a conviction for felony usable under Article 63 of the Penal Code. Judge Woodley stated:

"We need not rest our decision upon these authorities alone. If one who violates the National Motor Vehicle Theft Act would, if the act had been committed in Texas, be guilty of receiving stolen property under laws of this state also, he would not, unless the value of the automobile was \$50 or more, be guilty of a felony."

The Court went on to hold that the allegations of the indictment were insufficient to sustain a life sentence.

The Petitioner has brought himself squarely within the excessive punishment rule and having served the minimum term that could be legally assessed under the admissible evidence, that is, two years for the primary offense of burglary since the jury returned no verdict as assessing the term of years, he is entitled to his discharge. *Ex parte Erwin*, 170 S.W. 2d 226; *Ex parte Rolen*, 294 S.W. 2d 403; *Ex parte Goss*, 262 S.W. 2d 412; *Ex parte Castleberry*, 216 S.W. 2d 584; *Ex parte Lindsey*, 331 S.W. 2d 320.

The rule is well settled that where there is no evidence of guilt (no evidence to support the allegation of indictment as to the enhancement statute, Article 63, Penal Code of Texas) the judgment assessing a life sentence under the enhancement statute is excessive and said [fol. 84] excess may be inquired of by habeas corpus after the valid portion of the sentence has been served. *Corpus Juris Secundum*, Volume 39, Habeas Corpus, Section 226, Subsection E; *Ex parte Pruitt*, 141 S.W. 2d 333; *Ex parte Puckett*, 310 S.W. 2d 117.

The modern rule followed by the majority of the States with reference to excessive punishment under the enhancement or habitual criminal statute is discussed in the case

of *In re McVickers*, 29 Calif. 2d 264, 176 P. 2d 40. The case held that the adjudication that an offender is an habitual criminal within the meaning of the California statute not to be an element of adjudicated guilt nor a part of the judgment of the conviction, and hence reaches the result that no violence is done to the finality of the judgment or conviction for the primary offense by permitting a collateral attack on the determination as to a prior conviction. So, where proof in habeas corpus proceedings to secure the release of the Petitioner from custody showed the Petitioner was an habitual criminal who had been previously convicted of felonies enumerated in the habitual criminal statute twice, but not three times, one of the convictions constituting only a misdemeanor by California law, was held that the Petitioner was entitled to be accorded the benefits as well as the penalties of the law applicable to persons who had suffered two, rather than three, prior convictions. The Court said that the Writ of Habeas Corpus would lie to review an ancillary adjudication of habitual criminality which was unsup-[fol. 85] ported by the evidence as a matter of law and that the use of the Writ for this purpose is not subject to the objection that thereby the Writ is made a Writ of Error to review the judgment of conviction, or that it constitutes an unjustified collateral attack on such judgment, since an adjudication of the habitual criminal status is not a judgment or conviction, but involves merely a determination of certain facts which operate to prolong the confinement of the prisoner and limit his rights to parole. This same rule has been followed by the Court of Criminal Appeals of Texas in *Ex parte Burch*, 267 S.W. 2d 560, which held that an adjudication of guilt in the enhancement statutes as used does not create an offense of being an habitual criminal. Therefore, the collateral attack by means of habeas corpus is not upon the judgment of guilt with reference to the primary offense but only as to the enhancement feature of the case which would render a judgment in the subject case excessive.

A conviction of a criminal offense by a State Court based upon no evidence constitutes a violation of due process of law. *Thompson v. City of Louisville*, 362 U.S.

199; *Garner v. Louisiana*, 368 U.S. 157; *Taylor v. Louisiana*, 370 U.S. 154. Therefore, the failure of the State of Texas in the case at Bar to introduce any evidence to prove the obligation of the indictment that Petitioner had been convicted in the particular court alleged constitutes an imprisonment of the Petitioner without due process of law as to the excessive punishment.

[fol. 86] PROPOSITION OF LAW NO. 2

THE CONVICTION OF PETITIONER AND SENTENCING AS AN HABITUAL CRIMINAL WAS IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHT OF CONFRONTATION IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

STATEMENT

To sustain the allegation that Petitioner was the one and same person convicted on the 15th day of March, 1954, in the Criminal District Court No. 2 of Dallas County, Texas, in Cause No. 4561-IH as alleged in the second count of the indictment, the certification of J. C. Roberts, Record Clerk of the Texas Department of Corrections, to which he attached (1) a photograph, (2) fingerprints (3) commitments, of the originals of records in his office, of William Everett Reed, No. 138706, all of which are reflected by Petitioner's exhibits attached to the Petition herein. As further reflected by the records in this cause, the commitments referred to were the same as the judgment and sentence of the State of Texas and used in evidence as heretofore pointed out. The fingerprints, purported to be those of William Everett Reed, as was the photograph. With the fingerprints so certified, a fingerprint expert based upon a comparison therewith with known fingerprints furnished from the Department of Corrections testified that they were those of the Petitioner. It was upon this testimony, alone, that the State relied to identify the appellant as being the one and same person as was convicted in the Criminal District Court No. 2 of Dallas County, Texas, as alleged. All of this [fol. 87] identifying evidence was received over the ob-

jection of the Petitioner's trial counsel. The same procedure was employed in identifying by fingerprints, the Petitioner as the convict alleged to have been convicted in the Criminal District Court No. 2 of Dallas County, Texas, on the 20th day of June, 1947, in Cause No. 2781-BA on the docket of said Court as charged in the eighth count of the indictment.

ARGUMENT

The evidence relied upon to identify the Petitioner, was in violation of the Petitioner's constitutional right on confrontation as guaranteed by Section 10 of Article 1, of the Constitution of Texas and the Sixth Amendment to the Constitution of the United States and, which violation by a State Court constitutes to petitioner, a violation of due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

By the unlawful and illegal testimony relied upon to support the identification of Petitioner as the prior convict, definitely raises the Federal question that Petitioner has been denied due process of law in obtaining this petition, insofar as the prior convictions are concerned.

The proof relied upon by the State of Texas is the same procedure approved in numerous Texas cases, chief among which is that of *Davis v. State*, 321 S.W. 2d 873, over a dissenting opinion expressing the view that the evidence violated the constitutional guarantee of confrontation. In none of those cases wherein the pro-[fol. 88] cedure was approved did the Court of Criminal Appeals pass upon the constitutionality thereof, as against the contention of a violation of the guarantee of confrontation.

Neither the Supreme Court of the United States nor any of the other Courts of Federal jurisdiction have approved such procedure, especially against the contention of a violation of the constitutional guarantees of confrontation.

Petitioner, therefore, presents the question here and insists that the evidence identifying him as the prior convict as alleged in the indictment violated the guarantee of both the State and Federal Constitutions as heretofore

pointed out, and especially the violation of the Sixth Amendment by a State Court which constitutes to this Appellant a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

PROPOSITION OF LAW NO. 3

THE PETITIONER WAS DENIED THE RIGHT TO A FAIR AND IMPARTIAL TRIAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND SIMILAR RIGHTS GUARANTEED HIM UNDER THE CONSTITUTION OF THE STATE OF TEXAS, WHEN THE INDICTMENT ALLEGING PRIOR FELONY CONVICTIONS WAS READ TO THE JURY AND PROOF THEREON WAS HEARD BY THEM PRIOR TO A FINDING GUILT UPON THE PRIMARY OFFENSE.

STATEMENT

It is undisputed that at the trial of this cause the State prosecutor read the enhancement counts of the indictment to the jury and introduced into evidence evidence [fol. 89] of such prior convictions prior to the finding of guilt by the jury as to the primary offense. The Respondents do not deny this, but rather, insist that: (1) It was not harmful to Petitioner because the trial court's charge shows the jury was carefully instructed as to the proper place such proof played and the jury was instructed that the indictment was not evidence. (2) Petitioner, in failing to raise the point in State Court failed to exhaust the remedies available to him in the Courts of the State of Texas.

As to (1) the precise matter was considered in *Lane v. Warden, Maryland Penitentiary*, 320 F. 2d 179 (4th Cir., 1963) wherein the procedure allowing a reading of prior offenses alleged in the indictment at the outset of the trial was held to violate the constitutional requirement of due process, the Court stating:

"At the outset of Lane's trial the three indictments, each averring in repetitious fashion the details of

two prior convictions for violations of the Maryland narcotics laws, were read to the jury. This information, presented by the State itself as a matter of historical fact, can hardly have failed to influence the jurors at least as much as equivalent information obtained from newspaper articles, radio and television broadcasts, or remarks of a deputy marshall.

[fol. 90] Here, there was far less ground for jurors to doubt the truth of the matter than in cases where information comes from an unofficial source which has no responsibility for the conduct or ultimate fairness of the trial. Moreover, the likelihood of prejudice was enhanced in this case by the fact that the prior convictions of which the jurors were informed involved narcotics violations quite similar to those for which Lane was being tried. No issues of intent or intermingling of offenses made the information on these convictions relevant to the determination of Lane's guilt on the current charges. However, it is patent that jurors would be likely to find a man guilty of a narcotics violation more readily if aware that he has had prior illegal association with narcotics. Here is a classic instance of information that is nearly certain 'to weight too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.' Michelson v. United States, quoted supra. Such a prejudice would clearly violate the standards of impartiality required for a fair trial."

As indicated in *Lane*, many states, recognizing the problem of affording a fair trial, in the premises, have changed their procedure to avoid informing the jury of a defendant's prior offenses until after there has been a determination of guilt on the current charge.

Why should there *by* resistance to such a change? The answer is apparent—the procedure of Texas and other affords prosecutors a potent instrument in obtaining and assuming convictions on current offenses. Under the law of Texas, the defendant cannot prevent the pleading and proving of the prior offenses by the State. *Redding v.*

State, 265 S.W. 2d 811. The Texas procedure is identical to that condemned in *Lane*.

Turning now to the Respondent's second point—the alleged failure of Petitioner to exhaust the remedy available to him in the State Court, Respondent fails to appreciate that there was no "remedy" available to him in Texas Courts then or now. Both prior to the trial and after the filling of the petition in this cause, the Court of Criminal Appeals of Texas has ruled adversely to Petitioner's position on the identical question here raised. *Carso v. State of Texas*, No. 36,295, ____ S.W. 2d ___, [fol. 92] (January 29, 1964), appendix A. Respondent misreads *Fay v. Noia*, 372 U.S. 391. The "remedy" offered by the State referred to in *Noia* must be an "effective" to bar the Federal Court of the "power and the duty to provide it". Nothing could be more ineffective than to require an exhaustion of a remedy that does not in fact exist. See, Appendix A.

WHEREFORE, Petitioner prays that Respondent's Motion to Dismiss be denied and that Petitioner's prayer for Writ be granted after hearing hereon.

Respectfully submitted,

/s/ EMMETT COLVIN, JR.

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RI 8-3433 RI 7-5893

[Certificate of Service (omitted in printing)]

[fol. 93] APPENDIX A TO PETITIONER'S BRIEF
COPY

No. 36,295

Appeal from Harris County

CARLOS F. CARSO, APPELLANT

v.

THE STATE OF TEXAS, APPELLEE

OPINION
ON APPELLANT'S MOTION FOR REHEARING

Appellant complains that in our opinion on original submission we did not pass upon the contention that his rights were violated when the indictment alleging the prior convictions was read to the jury and exhibited before them. In his motion, appellant insists that he was denied the right to a fair and impartial trial under the Fifth and Fourteenth Amendments to the Constitution of the United States and like rights guaranteed to him under the Constitution of this State, when the indictment alleging the prior felony convictions was read to the jury and proof thereon was heard by them.

Appellant apparently overlooks the provision of Art. 642, V.A.C.C.P., which reads:

"Order of proceeding in trial.

"A jury being impaneled in any criminal action, the cause shall proceed in the following order:

"1. The indictment or information shall be read to the jury by the attorney prosecuting."

In Redding v. State, 265 S.W. 2d 811, this Court held that an accused was not denied due process under the Fourteenth Amendment to the Constitution of the United [fol. 94] States because the indictment against him alleging prior convictions to enhance the punishment under the habitual criminal statute, Art. 63, V.A.P.C., was read to the jury. In the opinion on motion for rehearing, we said:

"The prior offenses were required to be plead and proven, and we can perceive of no deprivation of constitutional rights by these statutes which have been in existence for many years."

This holding was again followed in Finley v. State, 278 S.W. 2d 864.

The motion for rehearing is overruled.

DICE, Judge

(Delivered January 29, 1964)

Opinion approved by the court.

IN THE UNITED STATES DISTRICT COURT

MEMORANDUM AND ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS AND DISMISSING PETITION OF
WILLIAM EVERETT REED FOR WRIT OF HABEAS
CORPUS—Filed: May 5, 1964

The case is before the court on respondent's motion to dismiss.

Petitioner, William Everett Reed, is a prisoner in state custody by virtue of a judgment and sentence pronounced upon him April 11, 1961, by the 89th Judicial District Court for Wichita County, Texas. His conviction of bur-[fol. 95] glary was enhanced by the application of the Texas recidivist statute, Article 63, Texas Penal Code, and he was sentenced to life imprisonment. He appealed his conviction to the Court of Criminal Appeals where it was affirmed, Reed v. State, 353 S.W. 2d 850 (Tex. Ct. Crim. App. 1962), and he subsequently filed a petition with that same court for a writ of habeas corpus. That petition was denied on June 29, 1963.

Reed now petitions this court for a writ of habeas corpus, alleging that he is being deprived of his liberty without due progress of law in three respects: (1) There was no evidence to support the assessment of the life

sentence; (2) The evidence used to identify petitioner as the person convicted in the two prior felonies was in violation of petitioner's constitutional right to confrontation; and (3) The allegations in the indictment pertaining to the two prior convictions, and the proof used to support the allegations, were presented to the jury prior to a determination of guilt on the primary offense. The petitioner requests that the case be determined without an oral hearing. Respondent moves to dismiss the petition on the grounds that it does not state a cause of action upon which relief may be granted and is wholly without merit. The petition presents only questions of law and can be determined on the motion to dismiss.

(1) The discrepancy between the indictment and the proof supporting the two prior convictions was not equivalent to an entire lack of evidence to support the life sentence.

[fol. 96] Petitioner points out that the indictment alleges two prior convictions of a felony, both in Criminal District Court No. 2 of Dallas County; but that the judgments and sentences introduced as evidence of those two convictions did not show the number of the district court in Dallas County. Such a discrepancy is only a technical insufficiency. The case numbers correspond with the indictment, as well as the name of the defendant, the offense, and the dates. This court is not concerned with the sufficiency of the evidence, but only with whether the defendant was deprived of his liberty without due process of law. See Bosselli v. Sanford, 155 F_{2d} 427 (5th Cir. 1946); Jordan v. Steiner, 184 F. Supp 432 (D.C.Md. 1960). And there is not such a complete lack of evidence so that it can be said that the defendant was deprived of any of his constitutional guarantees.

(2) Nor is the second ground urged by petitioner a sufficient basis for habeas corpus relief. In order to identify petitioner as the person who was convicted of the two prior felonies, the prosecution introduced certified copies of the judgment, sentence, commitment, fingerprint card, and photograph of the defendant in each of the previous convictions. The fingerprint records and photographs were certified by the Records Clerk of the Texas Department of Corrections, and expert testimony

was used to establish that the fingerprints of the persons previously committed were of the petitioner. It is urged that the use of such evidence deprived petitioner of his [fol. 97] right to confrontation as is guaranteed by the Sixth Amendment to the United States Constitution. But the use of such documentary evidence is entirely proper. The most that can be said for this argument is that it is an attack on the sufficiency and validity of the evidence. And as was pointed out above, this is not proper grounds for habeas corpus relief.

(3) The final ground urged by petitioner is not properly before the court at this time. Neither on appeal nor in the petition for habeas corpus in the State court has the petitioner raised any question as to the time at which the prior convictions were proved to the jury. This failure to exhaust the remedies available in the State courts precludes consideration of this allegation by this court. 28 U.S.C.A. Sec. 2254; Fay v. Noia, 372 U.S. 391 (1963). The argument that there is no remedy available in the State courts because there is precedent against petitioner's substantive position is specious at best. The statute is clear. "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C.A. Sec. 2254. Petitioner has the right to raise his third point in a petition for the writ of habeas corpus filed with the Texas Court of Criminal Appeals. Until this has been done, this court will not treat the issue.

IT IS, THEREFORE, ORDERED that respondent's [fol. 98] motion to dismiss be and it is hereby granted, and the petition of William Everett Reed for writ of habeas corpus be and it is hereby dismissed.

The clerk will record this Memorandum and Order on the minutes of the court and will forward true copies hereof to the Attorney General of Texas and counsel for petitioner.

Done at Houston, Texas, on this, the 5th day of May, A.D. 1964.

/s/ JOE INGRAHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed: May 21, 1964

Notice is hereby given that William Everett Reed, Petitioner above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on May 5, 1964.

Dated: May 19, 1964

CHARLES W. TESSMER
EMMETT COLVIN, JR.

By /s/ EMMETT COLVIN, JR.
706 Main Street
Dallas 2, Texas
Attorneys for Petitioner

[fol. 99]

IN THE UNITED STATES DISTRICT COURT

(Number and title omitted)

MOTION FOR CERTIFICATE OF PROBABLE CAUSE—

Filed: May 21, 1964

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Petitioner and, without waiver of his grounds alleged as reflected by Points (1) and (2) of the Memorandum and Order of this Court entered May 5, 1964, in addition to the grounds alleged therein would urge that a Certificate of Probable Cause should issue to authorize appeal to the United States Court of Appeals for the Fifth Circuit with particular regard to Point (3) of the Court's Memorandum and Order on the ground that 28 U.S.C.A., Section 2254, as construed by *Fay v. Noia*, 372 U.S. 391 (1963), as is reflected by the record in this cause and in the Opinion cited in Petitioner's Brief no "effective" remedy is available in the State

Courts of Texas and under the decision of *Fay* the Petitioner should be entitled to present such proposition to the United States Court of Appeals for the Fifth Circuit on the proposition that he has exhausted his effective remedies available in the Courts of the State of Texas, within the meaning of the aforesaid section.

PREMISES CONSIDERED, Petitioner moves the Court to grant his request for Certificate of Probable Cause authorizing thereby an appeal to the United States Court of Appeals for the Fifth Circuit.

CHARLES W. TESSMER
EMMETT COLVIN, JR.

By /s/ EMMETT COLVIN, JR.
706 Main Street, Suite 400
Dallas 2, Texas
Attorneys for Petitioner

[fol. 100]

IN THE UNITED STATES DISTRICT COURT

COURT'S NOTATION ON CALENDAR SHEET—June 17, 1964

"6-17-64: Petitioner's motion for certificate of probable cause (28 U.S.C. 2253) will be granted. The clerk will notify counsel to draft and submit appropriate order.

J.I."

IN THE UNITED STATES DISTRICT COURT
COST BOND ON APPEAL (CASH)—Filed: June 24, 1964

I, the undersigned, acknowledge that I and my personal representatives are bound to pay the State of Texas the sum of Two Hundred Fifty and no/100 (\$250.00) Dollars.

The condition of this Bond is that, whereas the Plaintiff, WILLIAM EVERETT REED, having appealed to the United States Court of Appeals for the Fifth Circuit by filing a notice of appeal on May 21, 1964, from a final judgment filed and entered on May 5, 1964, if the Plaintiff-Appellant shall pay all costs adjudged against it if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if the Plaintiff-Appellant shall fail to perform this condition, payment of the amount of this bond shall be due forthwith.

And to secure this bond the sum of \$250.00 has been deposited in the Registry of this Court by the undersigned.

Signed this 23rd day of June, 1964.

/s/ EMMETT COLVIN, JR.
706 Main Street
Dallas 2, Texas

[fol. 101] Received and deposited said sum of \$250.00 in the Registry of this Court on 22nd day of June, 1964.

V. BAILEY THOMAS, Clerk
U. S. District Court
Southern District of Texas

By /s/ W. PAUL HARRISS
Deputy

IN THE UNITED STATES DISTRICT COURT
CERTIFICATE OF PROBABLE CAUSE—Filed: June 30, 1964

I, JOE INGRAHAM, the Judge in the above entitled cause in which the Petition for Writ of Habeas Corpus was dismissed, do hereby certify that there exists probable cause for the appeal under 28 U.S.C.—§ 2253.

Witness my hand and seal as such Judge at Houston, Texas this the 30th day of June, A.D. 1964.

/s/ JOE INGRAHAM
United States District Judge

APPROVED:

/s/ EMMETT COLVIN, JR.
Attorney for Petitioner

/s/ SAM R. WILSON
Assistant Attorney General of Texas
Attorney for Respondents

[fol. 102]

IN THE UNITED STATES DISTRICT COURT
PRAECIPE FOR CONTENTS OF RECORD ON APPEAL—
Filed: June 30, 1964

TO THE CLERK OF THE ABOVE COURT:

You are hereby requested to make a transcript of record to be filed in the United States Court of Appeals for the Fifth Circuit, pursuant to notice of appeal filed herein, and to include in such transcript of record the following:

1. Petitioner's Application for Writ of Habeas Corpus.
2. Affidavit of Hon. Glenn Haynes, Clerk, Court of

Criminal Appeals of Texas, together with all numbered Exhibits attached thereto and made a part thereof.

3. Respondent's Motion to Dismiss.
4. Petitioner's Brief in Support of Petition and in Opposition to Respondent's Motion to Dismiss.
5. Memorandum and Order of Court dated May 5, 1964, dismissing Petition for Writ.
6. Notice of Appeal.
7. Certificate of Probable Cause.
8. Record of filing fee on Appeal.
9. Record of cost bond on Appeal.
10. This praecipe and service thereon.

Dated June 25, 1964.

/s/ EMMETT COLVIN, JR.
CHARLES W. TESSMER
Attorneys for Appellant

[fol. 103]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 104]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21846

WILLIAM EVERETT REED

versus

DR. GEORGE J. BETO, Director,
Texas Department of Corrections

MINUTE ENTRY OF SUBMISSION—March 4, 1965

On this day this cause was called, and taken under submission by the Court on record and briefs on file.

[fol. 105]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21846

WILLIAM EVERETT REED, APPELLANT

versus

DR. GEORGE J. BETO, Director, Texas Department of
Corrections, APPELLEE

*Appeal from the United States District Court for the
Southern District of Texas.*

Before TUTTLE, Chief Judge, and BROWN and FRIENDLY,*
Circuit Judges.

OPINION—April 7, 1965

BROWN, Circuit Judge: Reed appeals from the District Court's dismissal of his petition for habeas corpus. Reed was convicted of burglary. Because the jury also found him to have been twice previously convicted of a felony, the Judge sentenced him to life imprisonment under the Texas Habitual Criminal Statute.¹ This conviction was [fol. 106] affirmed by the Texas Court of Criminal Appeals. *Reed v. Beto*, 1962, . . . Tex.Crim. . . ., 353 S.W. 2d 850. A post-appeal habeas corpus petition to that Court was also found to be without merit.

In his petition to the District Court, Reed asserted three grounds for relief. The first, that there was no evidence to support the life sentence because of a technical variance in the indictment and the proof supporting the two prior felony convictions, is clearly without merit in a habeas corpus proceeding. There is like-

* Of the Second Circuit, sitting by designation.

¹ TEXAS PENAL CODE art. 63: "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

wise no substance to the second complaint that the introduction of certified copies of the judgment, sentence, commitment, fingerprint card, and photograph of the defendant in each of the two previous convictions was a denial of his right of confrontation under the Sixth and Fourteenth Amendments. This evidence was offered only for the limited purpose of establishing the identity of Reed as being the one convicted in the two prior cases, and that each conviction was for a felony less than capital. This evidence, supported by appropriate certification and expert testimony in the case of the fingerprint cards, was certainly competent for the purpose for which it was admitted, and no denial of any right of confrontation was established.

The serious issue raised by Reed is that the reading to the jury² of the indictment alleging prior felony convictions [fol. 107] and the presentation of proof thereon deprived him of a fair trial in contravention of the Fifth, Sixth, and Fourteenth Amendments as to the charge of burglary which in turn set in operation the enhanced sentence. Quite understandably, great reliance is placed on the recent Fourth Circuit holding to that effect in *Lane v. Warden*, 4 Cir., 1963, 320 F.2d 179.

Judge Ingraham of the Southern District of Texas dismissed the petition on the ground that Reed had not exhausted his state remedies since it is admitted that he had not yet presented this issue to the Court of Criminal Appeals either on the direct appeal or by way of habeas corpus. Thus it could not be said under 28 USCA § 2254 that there was no "procedure available" to raise the question presented. In the ordinary run of cases, dismissal clearly would be correct, but in this instance we do not think it necessary. The Court of Criminal Appeals has as early as 1954, and as late as March 10, 1965, passed on this very issue—consistently holding it to be no violation of due process to read the indictment to the jury and introduce evidence of prior

² Under TEXAS CODE CRIM. PROC. art. 642, the prosecuting attorney is authorized at the beginning of the trial to read the indictment to the jury.

felony convictions before the jury has found the accused guilty of the offense charged. *Redding v. State*, 1954, . . . Tex.Crim. . . ., 265 S.W.2d 611; *Carso v. State*, 1964, . . . Tex.Crim. . . ., 375 S.W.2d 297; *Stephens v. State*, 1964, . . . Tex.Crim. . . ., 377 S.W.2d 189; *Oler v. State*, 1964, . . . Tex.Crim. . . ., 378 S.W.2d 857; *Crocker v. State*, 1964, . . . Tex.Crim. . . ., 385 S.W.2d 392; *Buhl v. State*, 1965, . . . Tex.Crim. S.W.2d . . . [No 37932, March 10, 1965]. In *Oler* the Court expressly declined to follow the 4th Circuit *Lane* [fol. 108] case, and further indicated that it considered such a change in the law to be beyond its power.

"This Court has not been granted rule making powers, and we have concluded that the radical changes in long established common law and statutory procedures which would be required, were appellant's contention to be sustained must therefore come from the Legislature and not from this Court." 378 S.W.2d at 858.

In addition to this firm pronouncement, there has been no intervening United States Supreme Court decision of such direct or compelling a nature as to suggest that the Texas Court of Criminal Appeals would recognize, as it often does, that a fresh view must be taken.³

Thus we conclude that although there may be a procedure available, in these special circumstances, there clearly is no state remedy which could by any stretch of the imagination be pursued effectually. See *Hays v. Boslow*, 4 Cir., 1964, 336 F.2d 31; cf. *Whippler v. Balkom*, 5 Cir., 1965, . . . F.2d . . . [No. 21726, March 3, 1965]. Neither the statute nor the spirit of needed comity behind it require such a formalistic waste of precious judicial energy, state or federal. Adaptation in efficient judicial administration suggests no less. See *Younger Bros., Inc. v. United States*, S.D.Texas (3 Judge), 1965, . . . F.Supp. . . . [C.A. No. 64-H-80, February 16, 1965].

³ See, e.g., *Jackson v. Denno*, 1964, 378 U.S. 368, 84 S.Ct. . . ., 12 L.Ed.2d 908, and the resulting decisions of the Court of Criminal Appeals, *Lopez v. State*, 1964, . . . Tex.Crim. . . ., 384 S.W.2d 345; *Harris v. State*, 1964, . . . Tex.Crim. . . ., 384 S.W.2d 349.

[fol. 109] Passing then to the merits of this argument, in view of its being a pure question of law, we see no need to remand it for a determination by the District Court. This issue has been squarely decided—adversely to the Petitioner's position—by this Court in *Breen v. Beto*, 5 Cir., 1965, . . . F.2d . . . [No. 21518, January 28, 1965]. So long as that decision stands, denial of the relief was proper, although on the merits rather than for failure to exhaust state remedies.

AFFIRMED.

[fol. 111]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1964

No. 21846

[Title Omitted]

*Appeal from the United States District Court for the
Southern District of Texas.*

Before TUTTLE, Chief Judge, and BROWN and FRIENDLY,*
Circuit Judges.

JUDGMENT—April 7, 1965

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, William Everett Reed, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate: May 12, 1965.

* Of the Second Circuit, sitting by designation.

[fol. 112]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21846

[File Endorsement Omitted]

[Title Omitted]

PETITION FOR REHEARING—Filed April 26, 1965

TO THE HONORABLE JUDGES OF SAID COURT:

The Appellant above named respectfully petition this Honorable Court for a rehearing of the appeal in the above entitled cause, and in support of this petition represents to the Court as follows:

We reserve our argued position as to each of the points of appeal, but in this Petition we address ourselves solely to that feature of the Decision wherein we believe the Court may be convinced its result is based upon the application of an incorrect legal principle.

Therefore this Petition is devoted to convincing this Court that it has erred in its determination of the first major question put to it upon appeal. On the fifth page of the printed opinion, the Court concludes as to the merits of this proposition that the issue has been squarely decided adversely to Appellant by this Court in *Breen vs. Beto*, 5th Circuit, 1965, . . . F. 2d . . . (No. 21518, January 28, 1965) and that so long as such decision stands, denial of relief is proper. Appellant's position, simply stated, in all due respect to this Court is that the Opinion in *Breen* is incorrect and that proposition in *Lane vs. Warden, Maryland Penitentiary*, 320 F.2d 179 (4th Circuit, 1963) represents the correct view of the law. No justification for the onerous procedure under the Texas Habitual Criminal statute has ever been advanced except that it has been on the statute books for many years and no other reason has been advanced in this cause. Per-

[fol. 113] mitting a State to stack the victims of an un-

justified procedure like cordwood through the years seems a poor excuse to deny a litigant a fair trial on this day. The fact that many progressive States, as indicated in Lane, have recognized the inherent unfairness and have changed their procedure to avoid informing the jury of extraneous offenses is evidence enough of the basic unfairness to the accused.

The Court's attention is also directed to *Stephens vs. State*, 1964, . . . Tex.Crim. . . , 377 S.W.2d 189, which case is now before the United States Supreme Court, undocketed, for determination as to whether or not certiorari will be granted. It is the understanding of Appellant that a Brief has been presented in *Stephens* by Hon. William VanderCreek, of Dallas, Texas, in behalf of Stephens and that the Attorney General of the State of Texas has also submitted a Brief to the United States Supreme Court in such case in opposition. This Court may desire, and it is urged by Appellant, to withhold its action upon Appellant's Petition for Rehearing pending a determination in *Stephens* by the United States Supreme Court.

For the foregoing reasons, this Petition for Rehearing should be granted.

CHARLES W. TESSMER
EMMETT COLVIN, JR.
706 Main Street, Suite 400
Dallas, Texas 75202
RI 8-3433 RI 7-5893
Attorneys for Appellant

[Certification (omitted in printing)]

[fol. 114] * * *

[fol. 115]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21846

[File Endorsement Omitted]

[Title Omitted]

*Appeal from the United States District Court for the
Southern District of Texas.*

* * * *

Before TUTTLE, Chief Judge, and BROWN and FRIENDLY,*
Circuit Judges.

ORDER DENYING PETITION FOR REHEARING—May 11, 1965

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

[fol. 116]

[Clerk's Certificate to foregoing transcript omitted in printing.]

* Of the Second Circuit, sitting by designation.

[fol. 117]

SUPREME COURT OF THE UNITED STATES

No. 268 Misc., October Term, 1965

WILLIAM EVERETT REED, PETITIONER

v.

GEORGE J. BETO, Director, Texas
Department of Corrections

On petition for writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS AND GRANTING PETITION FOR WRIT
OF CERTIORARI—January 31, 1966

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 969 and placed on the summary calendar and set for oral argument immediately following No. 273 Misc.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.